

STATE OF MICHIGAN

IN THE SIXTH CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

V

No. 0

STEVEN LINDSEY MCBURNEY

Defendant

OAKLAND
COUNTY

07-214651-FC



JUDGE DANIEL P. O'BRIEN
PEOPLE v MCBURNEY, STEV

JURY HEARING

BEFORE HONORABLE DANIEL PATRICK O'BRIEN

MARCH 04, 2008

* * * *

APPEARANCES:

Sarah Pope Starnes, Esq.
On behalf of the People

Robert White, Esq.
On behalf of Defendant

Barbara Reznick, Court Reporter

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Pontiac, Michigan

TUESDAY, MARCH 04, 2008

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THE CLERK: The Court calls People
versus McBurney, case number 07 214651 FC.

MS. POPE-STARNES: Good morning Your
Honor. Sarah Pope-Starnes, assistant prosecuting
attorney.

THE COURT: Good morning.

MR. WHITE: Robert White appearing on
behalf of Mr. McBurney.

THE COURT: Thank you. The record
will reflect that Mr. McBurney is not present.
However it's up to you Mr. White. We either wait
for him to come on up, argue the instructions, and if
we do that then we have to wait for all the Jurors to
get here and there's no crossing in-between. Or we
can do the arguments right now while we're waiting
for the rest of the Jurors to come in.

MR. WHITE: We can do the arguments
right now.

THE COURT: Okay. All right.

Let's first start off with the --- someone can
recite those instructions to which we have a meeting
of the minds and then we can deal with the ones that

1 are objected to.

2 MR. WHITE: Okay.

3 THE COURT: If whoever has a second, go
4 ahead and start reciting them. I'm not even looking
5 at any instructions right now.

6 MR. WHITE: Okay.

7 I believe we agree on **3.1**, Duties of Judge and
8 Jury.

9 THE COURT: You can just say the number
10 if you would?

11 MR. WHITE: Okay.

12 **3.2, 3.3, 3.5, 3.6, 3.10, 4.1, 4.3, 4.5, 4.7,**
13 **4.9, 4.16, 5.2, 5.3, 5.10.**

14 MS. POPE-STARNES: I agree Your Honor
15 but we have, we had to finalize that uh --- and we
16 have not. I've not seen finalized copies from the
17 Defense. I have a copy of our original draft.

18 MR. WHITE: We've just ---

19 MS. POPE-STARNES: (Interposing) We've
20 agreed to it. We just need to list the doctors ---

21 MR. WHITE: (Interposing) Yes.

22 THE COURT: Oh. That's the expert one?

23 MR. WHITE: Yes. We just have to list
24 all the doctors.

25 THE COURT: Okay. All right. Very

1 well.

2 MR. WHITE: 5.11, 7.2, I believe umm ---
3 17.18, 7.3a, 17.20, 3.11 with modification depending
4 on the Court's ruling on a lesser includance. 3.13,
5 3.14, 3.15, 3.16, and the verdict form of 3.23 is yet
6 to be finalized depending on the Court's ruling.

7 MS. POPE-STARNES: Well 3.23 is a
8 separate instruction entitled verdict form. And
9 then there's a separate verdict form. And I agree
10 that the verdict form ultimately comes from the
11 Court's ruling.

12 THE COURT: 3.23 is the one that says I
13 prepared the verdict form?

14 MS. POPE-STARNES: Correct.

15 THE COURT: Okay. All right. Very
16 well.

17 That leaves for arguments, either one of you?
18 Is there what, five?

19 MS. POPE-STARNES: 4.11, and umm ---

20 THE COURT: (Interposing) Versus 5.8c?

21 MS. POPE-STARNES: Correct. Language
22 only in 16.4, 16.5 and 16.10. 17.21, 17.23 and
23 16.23 and 16.15 which the Defense presented
24 yesterday.

25 THE COURT: Okay. Umm --- the list of

1 the agreed, that is agreed Ms. Pope-Starnes?

2 MS. POPE-STARNES: Yes.

3 THE COURT: All right.

4 And the list of the disputed, likewise, Mr.
5 White, stipulate those are the disputed ones?

6 MR. WHITE: Yes.

7 THE COURT: Okay. Very well.

8 Whoever wants to leadoff on the **4.11** versus
9 **5.8c**?

10 MS. POPE-STARNES: Well I will Your
11 Honor.

12 The People filed a notice sometime the end of
13 two thousand and seven (2007), under **MCL 768.27d**
14 which is the prior acts, domestic violence statute.
15 We did not file that under **404b**. Counsel for the
16 Defendant filed a motion objecting to addition of any
17 prior acts or similar acts under that statute and
18 also objected to **404b**.

19 The Court did note umm --- the things that the
20 two had in common during a motion hearing but I
21 believe the **5.8c** specifically is instruction for
22 evidence that is admitted under **MCL 768.27d**. And
23 that **4.11** is specifically instruction for **404b**. And
24 **4.11** is more eliminative than **5.8c**. The statute
25 specifically says,

1 **"That the evidence may be offered**
2 **for any purpose for which it's**
3 **relevant."**

4 **404b** is more eliminating. So I believe that
5 the **5.8c** instruction is more appropriate in this
6 case. Especially as the People did not bring a
7 motion to the floor for this.

8 THE COURT: I don't want to oversimplify
9 it, but am I correct in --- in --- in this analysis?

10 That **5.8c** can be used for propensity purposes.
11 And but for --- but for the statute, the new statute,
12 it would not have been admissible for propensity
13 purposes because of **404b**?

14 MS. POPE-STARNES: I would agree. We
15 would have had to file a motion and have a hearing
16 under **404b** and have the Court rule as to whether or
17 not it was admissible for any of the purposes
18 enumerated specifically in **404b**.

19 THE COURT: And Mr. White.

20 MR. WHITE: Your Honor, the instruction
21 says,

22 **"The Prosecution has entered**
23 **introduced evidence of claimed acts**
24 **of domestic violence by Defendant**
25 **for which he is not on trial."**

Domestic violence is a term of art and it

1 suggests a finding of domestic violence that is some
2 kind of intentional perpetration of a harm against a
3 family member. And in this case, umm --- the call,
4 the prior case was a plea of no contest to reckless
5 causing of serious injury. Umm --- we believe that,
6 you know, the characterization of that as domestic
7 violence is improper. They would have to prove the
8 intentional nature of that act. It can't be done.
9 Wasn't done. It's not going to be done in this
10 case. So that's why we suggested 4.11 is a better
11 instruction because it says,

12 **"Committed improper acts for which**
13 **he is not on trial."**

14 Umm --- and limits the Jury's consideration to
15 not being able to say that, 'He's a bad man. That
16 he's done this in conformity with prior acts.'

17 It specifically addresses the concern of 404b
18 which I believe this Court still has to do under the
19 domestic violence statute. There's still --- still
20 a balancing that there has to be. This is limited
21 for --- this is introduced for a limited purpose.
22 And that's why we suggest 4.11 which doesn't recite
23 domestic violence because that would be the first
24 time the Jury would ever hear that phrase. And that
25 it's limited for a specific purpose that is to show

1 absence of mistake, things that are allowed under
2 **404b.** I believe Judge that it's a more proper
3 instruction.

4 THE COURT: Thank you.

5 MS. POPE-STARNES: Your Honor, if I may?
6 Specifically the phrase domestic violence comes
7 from the statute and it's defined. It doesn't
8 require a conviction. It specifically defines it
9 as, you know,

10 **"Acts or attempts of acts within a**
11 **family or household."**

12 And contrary to what Counsel has indicated the
13 Court of Appeals has recently issued an opinion and I
14 don't have the cite. It is published, **People vs**
15 **Patterson** which was issued on September eleventh
16 (11th), two thousand seven (2007) where the Court
17 said,

18 **"Once it meets 768.27 b you'd don't**
19 **need to get to 404b."**

20 So I disagree with Counsel on that and the Court
21 of Appeals has already ruled on that issue.

22 THE COURT: Anything further on that
23 matter?

24 MR. WHITE: Nothing Your Honor.

25 THE COURT: All right.

1 Go ahead with the **16.4, 16.5, 16.10.** These are
2 all joined together because it's choice of words
3 which would do it for one, you'll do it for all, I
4 guess. Is that correct?

5 MS. POPE-STARNES: That's correct Your
6 Honor.

7 THE COURT: Okay. Whoever wants to
8 speak on it, go ahead.

9 MS. POPE-STARNES: We've asked that the
10 cause of death in those be listed as was indicated by
11 the Medical Examiner, who's required by law to find
12 the cause and the manner of death. And his
13 testimony is that the cause of death was from blunt
14 force trauma. We've asked that it simply say that,
15 'It is a result of blunt force trauma.'

16 THE COURT: Mr. White?

17 MR. WHITE: And I believe the act has to
18 specifically be in there, what caused the blunt force
19 trauma. And now the medical examiner is saying, 'As
20 a --- the blunt force trauma as a result of being
21 thrown into her crib.'

22 So uh --- the medical conclusion needs a factual
23 basis. And since it appears that that is now Doctor
24 Dragovic's testimony, which he actually gave a
25 demonstration to the Jury, that I believe that umm --

1 - it's important for the Jury to hear those two
2 words, those two ideas together because that's now
3 the theory of the Prosecutor's case. Which it
4 wasn't the theory of the Prosecutor's case at the
5 beginning of this case. Which was the child's head
6 hit the rail. So I believe it's critically
7 important Judge to be able to put the medical umm ---
8 definition conjoined with the facts supposedly that
9 it's based upon.

10 MS. POPE-STARNES: Your Honor,
11 specifically Doctor Dragovic indicated that he did
12 not make an opinion as to where the child impacted
13 the head. He said he didn't know. He wasn't
14 present but he could tell based upon his training and
15 experience as a forensic pathologist, as a
16 neuropathologist, and based upon the autopsy that the
17 injury was as a result of blunt force trauma. And
18 the demonstration at the crib, we started here at the
19 rail, if the Court will recount --- recall, and then
20 went to the crib. And he was explaining to the Jury
21 what he meant by the term 'Unyielding surface.'

22 THE COURT: Anything else on that?

23 MR. WHITE: Yes. Just, you know, he
24 had to emphasize the lack of external injury. The
25 high probability it was a padded surface.

1 THE COURT: Gotcha. Right. Okay.

2 Thank you.

3 **17.21 and 17.23?**

4 MR. WHITE: Those are my requested
5 instructions Judge. And umm --- basically they
6 mirror **17**, first and second degree child abuse.
7 **17, 18, and 19**, which is requires intentional causing
8 of physical injury. **17.20** recklessly causing
9 serious physical injury. Those two correspond in
10 the sense that though harm in those two is
11 contemplated only to be physical harm not serious
12 physical harm.

13 And I believe based upon the testimony
14 that's been produced in this Court, not only by the
15 Defense, but by the Prosecution that the act of
16 throwing her into her crib, onto her mattress, could
17 have been an innocuous act. It could not, it may
18 not have been the act that caused this chronic
19 subdural hematoma to rebleed. It may have been
20 started already during the day when the child was in
21 distress with the testimony given by the mother. So
22 the Jury could find that he did this act, you know,
23 intentionally. He threw her into the crib causing
24 her physical harm, you know, but not serious physical
25 harm. The serious physical harm was caused by a

1 chronic condition that has been in existence for
2 months and months and months that may have been
3 symptom --- symptomatic already Judge by virtue of,
4 you know, the child's health during the day.

5 Again, the same argument with the recklessness.
6 It could be a reckless act causing physical harm.
7 Umm --- and what is the definition of physical harm?
8 We don't have that in these two particular
9 instructions nor in the statute. I mean a uh ---
10 just, you know, any kind of physical harm could be
11 construed as meeting these standards. Serious
12 physical harm is something that it is defined to a
13 degree. But the Jury certainly could find based
14 upon Doctor Uscinski's testimony and Doctor Dragovic
15 that the child being in a vulnerable condition that
16 the act itself was not the precipitating factor.
17 And that's why I believe that these two instructions
18 should be given.

19 THE COURT: Is this a dispute over
20 whether or not, again, I don't know if I'm
21 oversimplifying or not, the word serious? It's a --
22 - it's a dispute over the word 'Serious'?

23 MR. WHITE: Serious physical, yes.

24 THE COURT: And is it your position or
25 do you concede that there's no dispute the baby died?

1 And the cause of death going with one theory is a
2 preexisting condition plus some triggering effect,
3 however minimal necessary, those two factors wed
4 together equals death. And you're saying, and I
5 don't want to put words in your mouth, tell me if I'm
6 wrong, preexisting condition, we have --- let's just
7 think of it as a math equation. We have preexisting
8 condition and on the other side of the equal sign we
9 have death. And the variable is what the act was
10 that triggered the rebleed. And that could have
11 been the throwing, it could have been anything else.

12 MR. WHITE: But it could have been
13 spontaneously too Judge. And the doctors ---

14 THE COURT: (Interposing) And well ---

15 MR. WHITE: (Continuing) the doctors
16 from U. of M. agreed.

17 THE COURT: And --- and that touches on
18 an issue. And I'm sorry for interrupting but you
19 could follow-up on it. Every time I heard anyone
20 testify about spontaneous they said, 'Spontaneous.'
21 And then when it was defined, it never --- it wasn't
22 just something that had no triggering effect.
23 Spontaneous was used that --- that the triggering
24 event could have been very, very minor but
25 nevertheless there was an event, in any event.

1 There was some event. Spontaneous wasn't just
 2 nothing happened. Someone said, 'It could have been
 3 burping, it could have been bouncing, could have been
 4 throwing the baby but it had to be something.' And
 5 so I don't know. Maybe they were using the word
 6 spontaneous a little bit too loosely. But I --- I
 7 don't know what, --- what, you can go ahead and
 8 argue.

9 MR. WHITE: Well and I beg to differ
 10 Judge because in my --- in my questions of Doctor
 11 Maher, Doctor Dev, and umm --- uh --- Doctor Maher
 12 and Doctor Dev, specifically about chronic subdural
 13 hematomas, and that they can be caused by the umm ---
 14 the rebleed can be caused by minimal force and can be
 15 caused spontaneously. And that was the extent,
 16 spontaneously.

17 Doctor Uscinski says, 'The force can be trivial
 18 such as burping, coughing, you know, tipping over or
 19 spontaneous.' And he did not give an example. And
 20 what --- and it's not just an abstraction Judge.
 21 There's more than a little evidence that the child
 22 was in distress throughout the day because of the,
 23 you know, the symptoms that she was exhibiting.
 24 That she was symptomatic for this particular head
 25 injury during the day. So a Jury could conclude

1 that she'd already begun rebleeding, by virtue of the
2 vomiting, the headaches, the lethargy, the not being
3 herself. And remember, it's a registered nurse
4 mother who is testifying to this effect Judge. So
5 it may not have been the impact of the mattress.

6 And when you're saying there, you know, and
7 Doctor Dragovic said, 'There has to be some trauma',
8 even though he says, 'A child is less vulnerable.'
9 But there are facts on this record to support the
10 finding of spontaneity. That it could happen. And
11 specifically that this child was in distress as a
12 result that this particular condition earlier in the
13 day, before this event even happened. The alleged,
14 you know, the critical event.

15 THE COURT: If --- if it was triggered,
16 if the previous --- the rebleed was triggered by the
17 throwing, there'd be no dispute that it's serious
18 physical harm, is that right or wrong?

19 MR. WHITE: I would believe so, yes
20 Judge. If that was the sole evidence that that was
21 the beginning of the child's symptoms, it was that,
22 you know, but it's not. There was extensive
23 evidence that the child was in distress throughout
24 the day.

25 THE COURT: Okay.

1 MS. POPE-STARNES: First of all, Counsel
2 is incorrect about what the statute says. The
3 statute does define physical harm and it says,

4 **"Any injury to a child."**

5 Now in regards to serious physical harm, don't
6 forget Judge, we don't just have the testimony that
7 there was a subdural hematoma. We also have
8 testimony from Doctor Ibrahim yesterday that there
9 was an acute subarachnoid hemorrhage and that's
10 reflected in the autopsy protocol.

11 Also Doctor Dragovic testified that there was an
12 epidural hemorrhage to the spine below the area of
13 the neck in the upper back which was hemorrhaging in
14 the spinal area. And that that was the result of
15 blunt force trauma as well. And the statute talks
16 about any internal injury. It specifically says in
17 defining serious harm;

18 **"Including but not limited to".**

19 And in the list of enumerating physical harm is;

20 **"Internal injury."**

21 So we have more than just this chronic or remote
22 hematoma. Furthermore the case law is very clear
23 about this. If instruction is to be given on a
24 lesser offense, it must be supported by a rational
25 view of the evidence. And I would refer the Court

1 to People versus Badgley, (phonetic). I have a
2 copy. It's unpublished. It's out of Macomb County
3 Circuit Court from January twenty-third (23rd) of two
4 thousand and seven (2007), where there is no dispute
5 that the victim died after suffering a serious
6 physical injury, which was brain damage, subdural
7 hematoma, skull fracture. The dispute was whether
8 the Defendant acted with the necessary intent. And
9 in that case the Court said;

10 **"That that should not go to the Jury**
11 **on those lessers of third and fourth**
12 **degree."**

13 The Court said the same thing in People versus
14 Ormsby (phonetic) which again is unpublished. It's
15 from the Court of Appeals, May nineteenth (19th), of
16 two thousand (2000). And I have a copy of that.
17 And the Court says the same thing in People versus
18 Lutz (phonetic) which is unpublished from the Court
19 of Appeals from May twenty-seventh (27th) of two
20 thousand and three (2003).

21 It's not supported by a rational view of the
22 evidence in this case. There is serious physical
23 harm. There's a subarachnoid hemorrhage which is
24 acute which is new. And there's the epidural
25 hemorrhage. So even --- not even getting to this

1 argument about whether or not the chronic subdural
2 re-bled, we still have serious physical injury and
3 evidence of it. And it's in the autopsy protocol
4 and it's on the record in the testimony.

5 MR. WHITE: Well Judge, remember this
6 epidural hemorrhage was --- was testified to by
7 Doctor Dragovic. Umm --- was in contradiction to
8 his earlier testimony in preliminary examination. I
9 asked, 'If any soft tissue damage was done to the
10 neck'.

11 'No.'

12 Now he says, 'There's evidence of epidural
13 hemorrhage.'

14 And I think that has to be taken with a grain of
15 salt. Especially since his initial opinion was
16 blunt force trauma due to hitting a rail and now it's
17 the mattress. And I see --- you can see obviously
18 he's just trying to buttress his change of opinion.
19 And the Jury, you know, is there some evidence to
20 suggest that this was a spontaneous, could be a
21 spontaneous rebleed of a chronic condition. And I
22 believe that the record is replete with this basis
23 for asking for this instruction. The Jury could
24 conclude that yes, Steve intentionally or recklessly
25 caused physical harm but not serious physical harm.

1 THE COURT: Thank you.

2 All right. We're on **16.23** and **16.15**?

3 MR. WHITE: Yes. Those are my ---
4 **16.15** is my request. Umm --- and this is just part
5 and parcel of the argument just made Judge. The
6 Jury could find yes, that ultimately Madison died of
7 complications from a chronic subdural hematoma,
8 remote subdural hemorrhage, but Defendant's act was
9 not the cause.

10 THE COURT: I'm sorry for interrupting.
11 Shall --- is there a reason to combine these two or
12 keep them separately? I mean in terms, for purposes
13 of argument.

14 MS. POPE-STARNES: Separate Judge.

15 MR. WHITE: **16.15** is separate.

16 THE COURT: Okay. But let's --- let's,
17 which one do you want to argue?

18 MR. WHITE: **16.15** Judge.

19 THE COURT: Well go ahead.

20 MR. WHITE: Umm --- and if I may read
21 it? It is not enough that the Defendant's act made
22 it possible for death to occur. In order to find
23 that the death of Madison was caused by Defendant you
24 must find beyond a reasonable doubt that the death
25 was a natural or necessary result of Defendant's act.

1 And I believe that is absolutely important Judge
2 because we have here a potentially innocuous event
3 that becomes fatal. And that is a head striking a
4 child's mattress in a crib. But for the chronic
5 condition, the Jury could easily conclude that that
6 act was not the cause of death. So I do believe it
7 is appropriate.

8 THE COURT: From the People?

9 MS. POPE-STARNES: Your Honor, I would
10 disagree. I think if you look at the case law that
11 accompanies this instruction it's talking about
12 whether or not there's an intervening cause.
13 There's no testimony that there's an intervening
14 cause. And the testimony is clear from the record
15 that umm --- even if this child did have a chronic
16 subdural hematoma which re-bled, Doctor Dragovic
17 testified that there was force necessary to do that.
18 And that actually was done by the Defendant. It's
19 an act of the Defendant.

20 So I think that this is confusing for the Jury.
21 It's misleading to the Jury. Umm --- Counsel left
22 out the first line which is in parentheses, 'There
23 may be more than one cause of death.'

24 There's no testimony in this record of more than
25 one cause of death.

1 THE COURT: By the way on that note, I
2 looked at the instruction as well. That's
3 bracketed. And nowhere in the notes that I saw is
4 there an explanation for why it's bracketed. And I
5 think in other instructions whenever there's
6 bracketed material there's a description as to when
7 you use it or why you use it, why it's bracketed.

8 MS. POPE-STARNES: Right. And there's
9 not in this. I defer to the Court.

10 THE COURT: Okay.

11 MS. POPE-STARNES: But it does
12 specifically talk in the note about when one of the
13 issues is whether death was caused by some
14 intervening cause. And there's no testimony of that
15 here.

16 And quite frankly Your Honor, I don't want the
17 Jury to be confused in saying that the removal from
18 child (sic) support is some intervening cause ---

19 THE COURT: (Interposing) You mean
20 life-support?

21 MS. POPE-STARNES: Or life-support,
22 thank you. Because there's case law right on point
23 that that is not an intervening cause of death.

24 THE COURT: Okay.

25 MR. WHITE: I don't intend to argue

1 withdrawal of life-support is the cause of death
2 Judge. Umm --- and I don't believe that we disagree
3 that the cause of death was as a result of Madison's
4 brain swelling to the point of becoming dysfunctional
5 in comparing the brain stem shutting the core --- the
6 body's vital organs. But the act of throwing her
7 onto her mattress may not have been the precipitating
8 factor. Uh --- she had a preexisting condition ---
9 condition. The Jury could conclude that this
10 condition which existed before this was the cause of
11 the death, not my client's act.

12 THE COURT: 16.23?

13 MR. WHITE: I requested this Judge
14 because it addresses the issue of malice I believe.
15 And I know that the instruction was originally
16 drafted to deal with diminished capacity of defense
17 which has now been removed. Uh --- and again the
18 instruction says remove the third line which I did.
19 But the allegation regarding the felony-murder, the
20 malice is that the testimony of the police was that,
21 you know, the child screaming in his ear. And that
22 he threw her violently into the rail. But it's the
23 issue of his state of mind at the time he did this.
24 Whether there was this malice, intent to kill, intent
25 to cause great bodily harm, umm --- intent to

1 knowingly create a very high risk of death or great
 2 bodily harm. Knowing that that result would likely
 3 occur. Umm --- and so that's the state of mind that
 4 the Jury would have to, you know, conclude he was in
 5 at the time of this act of throwing her into the
 6 crib. And I believe that this focuses the Jury on
 7 this specific state of mind, this malice requirement
 8 of felony-murder. So I believe it's appropriate.

9 MS. POPE-STARNES: Your Honor,
 10 respectfully I absolutely disagree. Now they went
 11 through this in People versus Mayner (phonetic) where
 12 they talked about intent. And they talked about
 13 whether or not it was significant and it was
 14 appropriately covered under the Jury instructions.
 15 And as a result of this, this specific intent
 16 instruction was changed because the Supreme Court
 17 said this is already addressed in the specific
 18 instructions.

19 And my argument to this Court is this issue is
 20 already addressed in the specific instruction of the
 21 felony-murder and second degree murder. The second
 22 element that's specifically discussed is mens rea and
 23 has to do with whether or not there was intent to
 24 kill, intent to commit great bodily harm or the
 25 language about putting someone at risk where the

1 likely result is death or great bodily harm. Those
2 are already addressed specifically. Intent is
3 already addressed specifically in the first-degree
4 child abuse instruction. This instruction
5 specifically starts out with the language;

6 **"You have heard evidence concerning**
7 **the Defendant's mental condition at**
8 **the time of the alleged crime."**

9 No the Jury hasn't. They have not heard any
10 evidence of that. The statement that he --- that he
11 claimed to the officers that he was mad and
12 frustrated, that's not what that's talking about.
13 This instruction was specifically designed originally
14 for diminished capacity which is now no longer a
15 defense in this state. And this issue is also
16 addressed in the Badgley case that I cited to the
17 Court as unpublished from January of two thousand and
18 seven (2007).

19 Now the Court talks about, you know, the fact
20 that an expert can be offered by the defense in
21 regards to the state of mind. But this is not an
22 appropriate discussion. And the issue of intent and
23 the issue of mens rea is addressed specifically in
24 the specific instructions of felony-murder and
25 second-degree murder. And to give the Jury this on

1 top of that is simply confusing.

2 THE COURT: Thank you.

3 Anything?

4 MR. WHITE: I just, I guess it's not the
5 content is the nature of the objection. It appears
6 the objection is covered. And in matters of such
7 importance I don't see the prejudice of asking the
8 Jury to concentrate on the malice requirement of the
9 first-degree felony-murder uh --- charge. That is
10 intent to kill, so on and so forth. So I believe it
11 should be given.

12 THE COURT: Thank you. Thank you.

13 The Court has heard the arguments of Counsel
14 first and foremost based upon the stipulations. The
15 Court will need those instructions that have been
16 agreed to. And I'll ask, direct Counsel
17 respectfully to meet with my staff attorney, Ms.
18 Garelik, afterwards to compile a final set so that
19 everybody's on the same page. And I'll certainly
20 have copies made for you so that we're all literally
21 on the same page.

22 With respect to the arguments, **4.11** versus **4.8c**.
23 The Court orders as follows ---

24 MS. POPE-STARNES: (Interposing) I'm
25 sorry Your Honor. It's **5.8c** I believe.

1 THE COURT: I misspoke.

2 MS. POPE-STARNES: I just want to make
3 sure that we agree. I apologize.

4 THE COURT: No, no. That's good. No,
5 let's have it clear. No and thank you.

6 **4.11** versus **5.8c**. The Court orders as follows;
7 the Court adopts the Prosecutor's arguments and
8 grants **5.8c**, and consequently **4.11** is denied. The
9 Court is persuaded by their arguments.

10 With respect to **16.4**, **16.5**, and **16.10**, the
11 phrase to be included there the Court orders as
12 follows; the Court directs that the language be
13 quote, "Blunt force trauma." The Court does not
14 order language concerning being thrown into the crib
15 because the evidence is hypothetical whether the
16 blunt force trauma was due to the throwing into the
17 crib or something else.

18 With respect to **17.21** and **17.23**, the Court
19 orders as follows; based upon the evidence of other
20 injuries through Doctor Ibrahim and Doctor Dragovic,
21 besides the rebleed issue, the Court finds the
22 serious physical injury, the Defendant's credibility
23 challenge of Doctor Dragovic which is the Court finds
24 a weight issue notwithstanding.

25 With respect to **16.15**, the Court orders as

1 follows; the reasons by the Defendant, the Court
2 grants same. The Court will allow the language to
3 be --- language to be added to that instruction that
4 this does not include removal from life-support.

5 With respect to **16.23**, the Court orders as
6 follows; the Court finds this offered instruction was
7 already addressed in other instructions. The Court
8 also does not find that the Defendant's alleged
9 statement about being mad or being upset about the
10 crying qualifies under the subparagraph 1 of this
11 instruction.

12 So with those rulings I'll have Counsel go ---

13 MR. WHITE: (Interposing) I just --- I
14 just missed on **17.21** and **17.23**, the two misdemeanors,
15 child abuse, you ruled those out?

16 THE COURT: That, well I don't know what
17 if they're misdemeanors or not, but yes.

18 MR. WHITE: Okay. So those are out.

19 THE COURT: Yes.

20 So I'll instruct Counsel now to meet ---

21 Ms. Garelik can you take a couple of minutes
22 with them ---

23 MS. GARELIK: (Interposing) Yes.

24 THE COURT: (Continuing) and get sets
25 together?

1 MR. WHITE: Your Honor can I?

2 THE COURT: Go ahead. Go ahead.

3 MR. WHITE: I have a couple of
4 evidentiary issues while we're here.

5 Umm --- you directed us to try to retype that
6 one page in the University of Michigan records which
7 is Exhibit 1. And which is this particular page.
8 It's thirty-seven (37) of ninety-one (91.)

9 I've done my best using the typewriter that I
10 have. And I'll show it to sister Counsel. I don't
11 know if she was able to do anything better.

12 MS. POPE-STARNES: I don't have access
13 to any type of typewriter. We don't have that kind
14 of equipment anymore.

15 THE COURT: How does that look?

16 While your checking I'll just see how we're
17 doing on the Juror.

18 How we doing?

19 A VOICE: Good.

20 THE COURT: Okay.

21 Well have you looked at it?

22 MS. POPE-STARNES: That's fine Your
23 Honor.

24 THE COURT: Okay. Very well.

25 MR. WHITE: Okay. And with regard ---

1 MS. POPE-STARNES: (Interposing) And
2 is this my copy?

3 MR. WHITE: No. That's one copy and I
4 need to make copies.

5 MS. POPE-STARNES: Okay.

6 I'd like a copy made please so I can put it in
7 the Exhibit.

8 THE COURT: You can use our copier.
9 Go ahead.

10 MR. WHITE: With regard to admitted
11 Exhibits, T, U, V, W, and X, I've had uh --- blown up
12 copies of each one of these made. Taking this
13 Exhibit and blowing it up. Umm --- and I ask to
14 move for entry of the replacement Exhibits in lieu of
15 the Exhibits that were admitted into evidence.
16 Number one because they're more legible most but, you
17 know, they're the exact same Exhibit. There's no
18 prejudice. Uh --- so I'd ask that the replacement
19 Exhibits be admitted in lieu of the copies which,
20 again, with the limitations of a copy machine and
21 under the circumstances uh --- I believe it's proper
22 for the Jury to consider these.

23 THE COURT: Ms. Pope-Starnes?

24 MS. POPE-STARNES: Well Your Honor, I
25 think they can be used clearly as demonstrative

1 Exhibits during closing. But I don't think it's
2 proper to admit them at this point. Admission of an
3 Exhibit requires a witness to identify it and
4 authenticate and we've closed proofs in this case.
5 So I don't have an objection to Counsel using them as
6 demonstrative Exhibits during closing argument. I
7 do have an objection for them being substituted in
8 for Exhibits which were already admitted after a
9 witness identified them and talked about their
10 authenticity.

11 THE COURT: Mr. White.

12 MR. WHITE: I looked for authority
13 Judge, I could not find any and I just wanted to make
14 sure the Jury has a clear copy. Because of the
15 scheduling of bringing Doctor Uscinski in and using a
16 copy machine, we weren't able to get these until the
17 eleventh (11th) hour.

18 THE COURT: Well let me ask you both.
19 Is anybody aware of any law where demonstrative
20 Exhibits can be delivered into the Jury room?

21 MS. POPE-STARNES: I don't know that
22 they can. They have to be admitted as Exhibits.

23 THE COURT: The answer is 'No'?

24 MR. WHITE: I don't believe that they
25 can Judge.

1 THE COURT: Okay. All right.

2 MS. POPE-STARNES: And Doctor Ibrahim
3 was here yesterday. We could have asked to have him
4 identify them.

5 THE COURT: Gotcha. I --- I loathe to
6 disrupt anything in a record for appellate purposes
7 and so forth. And I uh --- I feel constrained not
8 to do so Mr. White. And I'll certainly invite you
9 to use them as a significant degree in front of the
10 Jury. But I better --- I better stay my hand in
11 that regard.

12 MR. WHITE: Very good Judge. And I
13 have one more demonstrative Exhibit which is all
14 Madison's doctor appointments, everything that she
15 had over the course of her life prepared from the
16 records in this case. And I just intend to use it
17 as per demonstrative purposes.

18 THE COURT: Very well. Thank you.
19 All right.

20 MS. POPE-STARNES: I would just inquire
21 then. Those records, that reflects records which
22 have all been admitted into the record, the records
23 from Doctor Adams, Doctor Piro, Doctor Lipkin?

24 MR. WHITE: St. Jo's and University of
25 Michigan.

1 MS. POPE-STARNES: Okay. And Doctor
2 Adam's medical records are what Exhibit letter?

3 MR. WHITE: BB.

4 MS. POPE-STARNES: Thank you.

5 THE COURT: Thank you.

6 With that ---

7 MS. POPE-STARNES: (Interposing) Your
8 Honor, I do have just one other very minor thing.

9 THE COURT: Go ahead.

10 MS. POPE-STARNES: I would ask, I've
11 noted in the last few days this door is very noisy.
12 And sometimes the outside door causes this door to
13 slam shut. I would ask during the time that we're
14 doing closing arguments if we can, that we either
15 have the courtroom door locked so that there's no
16 traffic in and out distracting or maybe a sign put
17 outside.

18 THE COURT: Any objection, Mr. White?

19 MR. WHITE: No objection.

20 THE COURT: I do that during
21 instructions. I certainly can extend and broaden
22 that to closing arguments as well.

23 Thank you.

24 MS. POPE-STARNES: Thank you Judge.

25 THE COURT: We'll break at this time.

1 Why don't we before I have the Defendant brought
2 up, give me maybe a five or ten minute lead time so
3 you can compile all the instructions together and
4 then I'll have him called up?

5 MR. WHITE: Okay.

6 THE COURT: Sound good?

7 MR. WHITE: Do you want a theory of the
8 case from us?

9 MS. POPE-STARNES: I waive theory of the
10 case Your Honor.

11 MR. WHITE: Same here.

12 THE COURT: Okay.

13 MR. WHITE: My theory would have been
14 given at closing.

15 THE COURT: Then I'll just read the
16 straight out instructions.

17 Thank you.

18 MR. WHITE: Thank you.

19 (Whereupon a recess was had.)

20 * * *

21 THE CLERK: The Court calls People
22 versus McBurney, case number 07 214651 FC.

23 THE COURT: Counsel?

24 MS. POPE-STARNES: Sarah Pope-Starnes,
25 assistant prosecuting attorney on behalf of the

1 People.

2 THE COURT: Thank you.

3 MR. WHITE: Robert White appearing on
4 behalf of Mr. McBurney, standing to my immediate
5 right.

6 THE COURT: Thank you.

7 Good morning. Ready to proceed?

8 MS. POPE-STARNES: We are Your Honor.

9 THE COURT: All right. Thank you.

10 MR. WHITE: Yes.

11 THE COURT: Jeff, you can bring in the
12 Jury.

13 THE CLERK: Yes, Your Honor.

14 MS. POPE-STARNES: And Your Honor, in
15 regards to the doors of the courtroom?

16 THE COURT: He's going to take care of
17 it. And by the way, and thank you.

18 Folks that are here in Court I just wanted to
19 make a brief announcement. You're all welcome
20 obviously to stay but those that stay are in for the
21 duration umm --- at least until a break. And uh --
22 - Jeff is going to keep that door locked and then
23 keep an eye on that one, okay.

24 THE CLERK: Yes Your Honor.

25 THE COURT: Thank you.

1 You can bring in the Jury.

2 (Whereupon the Jury was returned to the courtroom at
3 10:05am.)

4 * * *

5 THE COURT: Good morning everyone.

6 You may all be seated. The record will reflect
7 that the Jury is back.

8 Ladies and Gentlemen, at risk of sounding
9 insincere by apologizing yet again, I'm going to say
10 it anyways. I do apologize. We have been working
11 on the matter and I appreciate everybody's patience
12 and indulgence here.

13 And with that.

14 MS. POPE-STARNES: May we approach?

15 THE COURT: You may. Sure.

16 (Whereupon a discussion was held at the Bench out of
17 hearing of the Jury and the Court Reporter.)

18 * * *

19 THE COURT: Yeah, Counsel brought up a
20 good point and I think maybe you're all in agreement.
21 We've been doing the note taking or allowed you to do
22 the note taking for the evidence portion of the case
23 but during the closing arguments I'd ask you to just
24 set them off to the side or collect them or whatever
25 if you would. And uh --- just listen folks, all

right? Thank you very much.

Ms. Pope-Starnes.

CLOSING ARGUMENTS

MS. POPE-STARNES: Ladies and Gentlemen, I know that it's been a very long two-and-a-half weeks. And I want to start out by thanking you on behalf of the People of the State of Michigan and on behalf of myself personally for your patience and your time and your attention throughout this matter.

If you'll recall we talked in opening statements about the crimes that the Defendant is charged with. He's charged with First Degree Felony Murder and count two is First Degree Child Abuse.

And you'll recall that I talked to you about the parts or the elements of those crimes. Now I'd like to talk to you about the facts or the testimony as it came out in this case. And I'd like to talk to you in more of a chronological order than the witnesses were able to appear.

Heather McBurney testified that she was the mother of Madison McBurney, that the Defendant is her husband and Madison was his daughter. She told you that in November of nineteen (19), excuse me, two thousand and six (2006) that Madison was approximately eleven (11) months old. That she was

1 born with hip dysplasia, that she was born with a
2 congenital condition to her scalp that had the
3 appearance of skinned knees not healing. She told
4 you that they resided on Scott Street in the city of
5 South Lyon here in Oakland County. And that the day
6 before November thirtieth (30th) on the --- on
7 November twenty-ninth (29th) Madison was fine.

8 On November thirtieth (30th) she said she got up
9 sometime six (6:00) to six-forty-five (6:45) in the
10 morning and she got Madison up. That Madison was
11 awake when she went into her room. She was playing
12 with her bumper pad and she said she had a little bit
13 of spit up on her face and her sleeper.

14 Now you recall that Heather McBurney testified
15 that she, as any parent, recognizes the difference
16 between projectile vomiting and baby spit up. And
17 she said that appeared to be spit up to her. She
18 testified that a little bit later in the morning
19 Madison took a nap for about twenty (20) minutes.
20 And after the nap she was going to give her a bath.
21 And then as she was running the bath Madison
22 projectile vomited. That she called in the
23 Defendant so that she could get cleaned up and she
24 could clean Madison up. And then she gave her a
25 bath. And she told you that Madison seemed to be

1 okay during the bath. That she played a little bit
2 in the tub.

3 Later in the day Madison threw up a little bit
4 more. And she told you that it was just enough that
5 she had to change Madison's shirt. But she was able
6 to eat later. She was able to hold food down. She
7 told you that about noon (12:00) Madison took a nap
8 for forty-five (45) minutes. And she said, 'Madison
9 was fine. There was no reaction to being laid down
10 for that nap.'

11 She said that, 'During the afternoon after
12 Madison got up from that nap, that she drank some
13 apple juice and that had some water in it. She kept
14 that down. She played on the floor.' That she sat
15 in Heather's lap. She gave her more food which
16 Madison kept down. And about five o'clock (5:00)
17 Heather McBurney started to get dinner ready and get
18 ready for work.

19 She told you that about five (5:00) to five-
20 forty-five (5:45) she laid Madison down in her crib.
21 And Madison appeared to be normal at that point.
22 And when she last saw her she was laying in her crib
23 playing with a toy.

24 Heather McBurney told you that she left for work
25 at about six o'clock (6:00) and sometime shortly

1 after seven (7:00) she got a call from the Defendant
2 where he makes his first statement telling her that
3 Madison had collapsed and that the paramedics were
4 working on her. She told you that with the help
5 from somebody from work that she got to the
6 University of Michigan Hospital and pulled up at
7 about the same time that the ambulance was. And she
8 testified that she saw them bring Madison out of the
9 back of the ambulance. And that the Defendant
10 exited the back of the ambulance.

11 She said that after they got to the hospital the
12 Defendant told her that the baby had been sitting on
13 the floor and he was putting some clothes away and
14 the baby fell back stiff and then limp. Heather
15 McBurney told you that she stayed with Madison. She
16 was there in the hospital except, I believe she said,
17 she left very briefly one day to get some other
18 clothes because she was in her work clothes. That
19 she stayed with her day and night, that she didn't
20 sleep much. She knew that Madison was in very
21 serious condition and she knew that Madison was not
22 expected to live.

23 She testified that in the early morning hours of
24 Sunday, December third, she was called into a
25 conference room down the hall from Madison's hospital

1 room. And that she met with Sergeant Sovik and
2 Detective Sederlund and spoke with them. And she
3 told you that she thought maybe Sergeant Sovik had a
4 tape recorder that she might have heard a noise.
5 She said that after she spoke with them that she went
6 back to Madison's room. And she was later called
7 back to the conference room where her husband, the
8 Defendant, now was with the detectives. She told
9 you that Sergeant Sovik spoke first but she couldn't
10 remember what he said. And that the Defendant said
11 he threw Madison in the crib. She told you that she
12 didn't remember anything more being said after that.
13 She said she was stunned. And that later after the
14 police left the room she spoke with the Defendant,
15 her husband, alone. And she testified she couldn't
16 remember that conversation except that there was
17 something in it about the Defendant's son, Nicholas
18 Kennedy.

19 Now Ladies and Gentlemen, when you think about
20 and are weighing the credibility of witnesses'
21 testimony, and the Judge will give you an instruction
22 about that and how to consider whether or not
23 witnesses are credible, when you think about this and
24 you think about Heather McBurney remember that this
25 is a woman who was grieving and is still grieving for

1 her daughter. That she was in shock when this
 2 happened. That this is a terrible, terrible thing.
 3 She leaves for work and her daughter's lying in a bed
 4 playing with a toy. And the next thing she knows,
 5 she's in a critical care unit, pediatric intensive
 6 care unit. She's going to die. She's had little
 7 to no sleep for days.

8 So when you think about her credibility and you
 9 hear things like the witnesses from the first
 10 responders and the paramedics, and they testify about
 11 the layout of the ambulance and the Defendant
 12 couldn't get out the back of the door because there
 13 wasn't, that's not how the ambulance was setup. And
 14 you think about whether or not she was able to judge
 15 whether or not Sergeant Sovik had a recording device.
 16 I believe one of the officers told you, 'I wish we
 17 had had one.' Sergeant Sovik testified he had his
 18 gun on one hip and a cell phone on the other. Well
 19 when you think about her and her credibility remember
 20 that she is a grieving mother and had to suffer the
 21 death of her child.

22 You hear testimony from Lieutenant Craig
 23 Johnston from the South Lyon Fire Department. That
 24 on November thirtieth (30th) sometime around seven
 25 p.m. (7:00pm) they were dispatched to the McBurney

1 home on Scott Street. He told you they were there
2 within three minutes. And that two of his first
3 responders came in and began working on Madison
4 immediately. He told you he remembers that the baby
5 was laying on the floor right inside the front door,
6 about six feet from the door. That her head was
7 towards the door, that she was laying face up. He
8 remembers seeing a bouncy chair on the floor of the
9 living room and a bottle on the floor about two feet
10 away. He told you the Defendant was on the
11 telephone when he came in. And now we have another
12 statement of the Defendant. To Lieutenant Johnston
13 he said, 'That the baby had been sick all day.' He
14 fed her a bottle. That he went to the other room.
15 That he came out and the baby was having seizure-like
16 activity. He told Lieutenant Johnston, 'That the
17 baby had no medical history and was not on any
18 medications.' Lieutenant Johnston told you that
19 those first responders suctioned the baby and gave
20 oxygen immediately And then after a second squad of
21 first responders and the ambulance arrived it was a
22 load and go situation. This is an infant who needs
23 an emergent care. And one of the paramedics picked
24 up that baby and they went to the ambulance and they
25 left. And he told you that he sent firefighter

1 Wilson and a Sergeant Schuldt with the ambulance to
2 assist the paramedics.

3 You heard testimony from Sergeant Schuldt that
4 he is a basic EMT with the South Lyon Fire
5 Department. That he was one of the first responders
6 who was called to that scene. That the first two
7 first responders and the Lieutenant were already
8 there. He arrived about the same time as the
9 ambulance. He told you that when he went in he saw
10 the baby on the floor with the other two first
11 responders attending to the baby. He identified the
12 Defendant. He told you that he heard the Defendant
13 say he'd been feeding the baby in a bouncy seat.
14 That the baby had spit the bottle out. That he
15 picked up the baby and took her to a room to change
16 her. And he testified that he saw the Defendant
17 point towards a back area of the home. And that the
18 Defendant said when he got her to the back of the
19 house the baby stopped breathing. Sergeant Schuldt
20 testified that they were using a mask rebreather with
21 blow-by air. And that after one of the paramedics
22 picked her up and carried her outside, he went with
23 them. And his responsibility during the whole ride
24 was making sure that that child had oxygen. And he
25 did that. Even as there was an attempt to intubate

1 her which couldn't be done because she still had a
2 sucking reflex, he still had that oxygen he told you,
3 right there. He told you about his observations of
4 Madison during the transport at the time to
5 University of Michigan Hospital. That at one time
6 her eyes were pinpoint. And that when they got
7 closer to the hospital her eyes rolled back in her
8 head. And she began to draw her arms up and become
9 more stiff. He told you the Defendant only spoke
10 when he was asked questions in the ambulance. And
11 that the Defendant sat up in the front part of the
12 ambulance by the driver. He said he recalled the
13 Defendant saying that, 'Madison had MRSA and was on
14 an antibiotics,' when they were in the ambulance.
15 But that the Doctor had said that Madison would be
16 fine.

17 You heard testimony from Matthew Calus who was a
18 paramedic with Huron Valley Ambulance. He told you
19 he as well with his partner were dispatched to the
20 home on Scott Street on November thirtieth (30th) of
21 two thousand and six (2006). That the South Lyon
22 Fire Department was already on the scene. That when
23 he came inside the baby was right inside the door and
24 they were administering oxygen. He told you the
25 father, the Defendant, gave a history at the scene.

1 The baby woke up from a nap. Was normal after the
2 nap. That he fed the baby formula. And he left
3 the room and came back. That she coughed and was
4 unresponsive. He told you that he personally picked
5 up Madison and carried her to the ambulance. That
6 it was a load and go situation. And that during the
7 transport he was trying to figure out what they were
8 dealing with. He talked about maybe it was a
9 seizure but it didn't appear to be to him because her
10 arms and legs were limp and flaccid. They weren't
11 stiff. And father told him when he asked him, 'That
12 there was no history of seizure.' He wondered if it
13 was poisoning but the Defendant said, 'That there
14 were no drugs or chemicals that had been ingested by
15 the child.' He wondered if it was an issue with her
16 blood sugar but the testing showed that it was within
17 normal limits even on the higher side. He said that
18 in the hos --- in the ambulance during the transport
19 that the Defendant said that, 'The child had MRSA and
20 hip dysplasia.' But denied that she was on any
21 medications or had any allergies. And Sergeant
22 Schuldt told you that the Defendant's behavior was
23 not consistent with that of a concerned parent.
24 That he was extremely calm during the ride. Didn't
25 say anything except when specifically asked a

1 question.

2 You heard testimony from Doctor Sikavitsas, the
3 emergency room physician, who testified that when
4 Madison arrived in the emergency room at Mott
5 Children's Hospital at U. of M. that she was
6 unresponsive. That her eyes were shifted towards
7 the right which she said indicated to her an abnormal
8 focus on the brain. Madison was breathing on her
9 own and that she had increased tone. She talked
10 about the treatment that they began. They
11 immediately began to give her medications to address
12 any possible seizure activity. She testified that
13 after she gave her Phenobarbital that tone improved
14 and the eyes went back to midline. She told you
15 that she intubated Madison. That she gave --- put a
16 breathing tube down her throat. Not because they
17 had lost her airway and she was not getting
18 sufficient oxygen but because they wanted to do it to
19 preserve or protect that airway. She told you that
20 she ordered some lab testing be done and that a CT or
21 CAT scan be done. And that the results of that CT
22 was that there was blood or bleeding in Madison's
23 brain. She testified that she got a history from
24 the ambulance personnel first and then while the
25 parents were in the room a history was given. And

1 in that history that was given in the emergency room
2 the information was that Madison had had three
3 episodes of vomiting that day. That she'd been
4 sitting on the floor with --- on the floor with the
5 Defendant. That she made a gurgling noise and fell
6 over. That the Defendant denied that the baby or,
7 excuse me, the Defendant claimed that the baby had
8 been vomiting since the previous day. And that the
9 parents denied any recent trauma, injury, fall,
10 tripping. And said, 'That there was no history of
11 seizures.'

12 You heard testimony from Doctor Odetola, who is
13 a pediatric intensive care unit physician, who began
14 to care for Madison on December first of two thousand
15 and six (2006) when she was in the pediatric
16 intensive care unit. He told you and talked to you
17 about what some people call the differential
18 diagnosis. He called it prioritization. That
19 there were different things. He tried to prioritize
20 them and tried to figure out what was going on so
21 that they could treat Madison. He told you that
22 they --- he made sure that she was on medication.
23 That she was sedated. That her head was kept
24 midline and elevated. That he consulted with
25 specialists in other areas. That she was given

1 antibiotic --- antibiotics and antiviral agents in
2 case it was some type of infection. That an
3 intracranial pressure monitor was put in by a
4 neurosurgeon. And that they used this not only to
5 gauge her pressure but that way they could test her
6 cerebral spinal fluid to see if there was any kind of
7 infection.

8 THE COURT: Hold on one second Counsel.
9 I'm sorry.

10 Jeff you can...

11 A VOICE: I'm sorry.

12 MS. POPE-STARNES: He told you that he
13 ordered lab work of the blood of the different fluids
14 of the body. And he told you that he reviewed other
15 testing, the CT scan, the MRI scan. And that he
16 placed a central venous catheter. He testified that
17 he ruled out infection. From the lab tests that
18 were done there were no signs of infection. And
19 that his diagnosis was there was trauma to the brain.
20 A severe brain injury of a nonaccidental nature.

21 You heard testimony from Doctor Maher who is a
22 pediatric neurosurgeon, one who actually saw and
23 treated Madison. Doctor Maher told you that when he
24 saw Madison on December first, I think his words
25 were, 'Quite ill.' That she was under sedation and

1 she was on a ventilator. That he reviewed the CAT
2 scan of November thirtieth (30th) and December ---
3 and the MRI of December first and that he observed
4 that she had injuries to the brain of two different
5 ages. He told you that in the frontal lobe area was
6 an older or chronic subdural hematoma and that there
7 was another hematoma over the supratentorial area of
8 the temporal lobe and that that was acute. He also
9 was aware that her optic disc was bulging. He told
10 you that that's an indicator of swelling in the brain
11 and a marker for elevated pressure in the head. He
12 told you that his differential diagnoses were number
13 one, that this, there was a traumatic injury,
14 possibly intentional, possibly accidental. Number
15 two, a blood vessel malformation. Number three,
16 extra large spaces in the head. Number four, a
17 bleeding disorder. And he testified that he was
18 able to rule out the bleeding disorder. From the
19 tests that they did there was no bleeding disorder
20 that Madison was suffering from. From a review of
21 the MRI and the CT he did not have concern for extra
22 large spaces in the brain. And the results showed
23 no evidence from the imaging of blood vessel
24 malformation. That left him with traumatic injury,
25 accidental or intentional. And he told you that no

1 history had been given that this child had been
2 involved in an accident. He testified it was his
3 opinion that this was not consistent with a chronic
4 subdural hematoma rebleeding. He said the severity
5 of the injury indicated that to him. That it does
6 not lead to devastating injuries of this nature.

7 You heard testimony from Doctor Leena Dev who is
8 a pediatrician and the head of the child protection
9 team at University of Michigan Hospital. She told
10 you that she was asked to consult on this case. And
11 then on December first of two thousand and six (2006)
12 she came in to see Madison. She told you that she
13 takes a history herself. And she took a history
14 from both parents, both the Defendant and Heather
15 were there in the room sitting together within
16 earshot of each other as she took a history from
17 them. And the history that was given to her was
18 that Madison was well all day on November thirtieth
19 (30th). That she took a nap at five-forty-five
20 (5:45). At six o'clock (6:00) mother left for work.
21 The Defendant woke Madison up between seven (7:00)
22 and seven-fifteen p.m. (7:15pm). That he put her in
23 a bouncy chair and gave her milk, a bottle of milk.
24 And she drank about two ounces of it. That Madison
25 threw the bottle on the floor. And he took her in

1 her room, changed her diaper, changed her into
2 pajamas and put her brace on. That he set her on
3 the floor and that she was gurgling. That he looked
4 at her and all four of her limbs became stiff with
5 her back arching and that he called nine-one-one
6 (911). Doctor Dev talked to you about the physical
7 examination that she was able to do. Her review of
8 the CT's and the MRI's with a neuroradiologist, I
9 believe she said it was Doctor Doug Quint. That she
10 reviewed the other reports, medical records, and
11 other testing. And it was her opinion and diagnosis
12 that Madison had suffered from abusive head trauma.
13 A brain injury from inflicted trauma. That she
14 concluded this from the subdural hemorrhaging, the
15 retinal hemorrhaging in the retina of the eye, the
16 fact that the history changed. In her review of the
17 medical records she told you that the history given
18 to Doctor Leber, Doctor Dev, herself, and Doctor
19 Annich were all different. And that the last
20 radiology images ruled out medical causes.

21 Now Ladies and Gentlemen, People's Exhibit 1,
22 the medical records from the University of Michigan
23 Hospital are in evidence. And the Judge will tell
24 you in the Jury instructions that if you would like
25 to see any of the Exhibits during your deliberations,

1 all you have to do is ask for them. I invite you to
2 look at histories in Doctor Leber's, Doctor Yang's,
3 Doctor Dev's and Doctor Annich's medical reports and
4 see whether or not the history being given of what
5 happened to Madison is the same or if there are
6 inconsistencies.

7 You heard testimony yesterday from Doctor
8 Ibrahim who is a pediatric neuroradiologist. He
9 specializes in that. He completed a fellowship in
10 that. He is board certified in that. And he
11 reviews over seven thousand (7,000) images a year.
12 He told you that he reviewed Madison's MRI's and CT
13 scans including the MRI from August of two thousand
14 and six (2006) and the CT scan from September
15 eleventh (11th) of two thousand and six (2006). He
16 told you contrary to the neurosurgeon, Doctor
17 Uscinski's testimony that there was not an old and a
18 new subdural hematoma in the August thirty-first
19 (31st) MRI. He said that when he looked at it he
20 saw a subacute subdural hematoma. And it could have
21 possibly been a lipoma as initially expressed in that
22 radiology report. He told you in the December first
23 MRI he observed subdural hematomas on the right and
24 the left side. Subacute in the parietal and
25 occipital area --- area. Chronic or older in the

1 frontal lobe area. And in the left temporal area an
2 acute subarachnoid hemorrhage. Brand new in the
3 subarachnoid space. And remember he put those
4 diagrams up on the screen for you. The subarachnoid
5 space is a different layer of the brain than the
6 subdural space.

7 When you think about it, think about a box that
8 is packaged and wrapped. And that box has to be
9 shipped so it's put inside of another box.
10 Different layers of the brain that are separated, the
11 subarachnoid space and the subdural space. And in
12 that subarachnoid space a brand new hemorrhage.

13 People's Exhibit 17, the autopsy protocol. I
14 encourage you to ask for that and to look at that in
15 your deliberation. And note where Doctor Dragovic
16 talks about the subarachnoid hemorrhage in the
17 temporal area.

18 Now you've heard testimony from Detective
19 Sederlund and Sergeant Sovik, the two officers that
20 were assigned to investigate these injuries to
21 Madison. They told you that they received a call on
22 Saturday, December second, of two thousand and six
23 (2006). That they were not working that day, that
24 they each came into the station sometime late in the
25 evening. They told you about the different things

1 that they did after they were briefed. Attempting
2 to interview the first responders, the firefighters.
3 Attempting to interview the paramedics. Detective
4 Sederlund talked about trying to find something to
5 record an interview with. And that in their small
6 department in a drawer stuffed in with some other
7 things he found an old cassette recorder. That it
8 didn't work. And when he looked at it the battery
9 compartment was corroded. He got some new
10 batteries. That still didn't work and he threw it
11 out.

12 Sergeant Sovik told you he made an attempt to
13 locate a recording device but they didn't have any.
14 And they left the police and they went to Northville
15 Township Police Department. After they left there
16 they went to the University of Michigan Hospital.
17 They were met by Sarah Weaver from protective
18 services in Washtenaw County and they spoke with her.
19 They went up to the pediatric intensive care unit and
20 they spoke with a doctor in a conference room.
21 After that they asked if they could speak with
22 Heather McBurney. And a nurse, Regina Cunnard
23 (phonetic) stayed in the room with Heather while they
24 spoke with her. They told you they spoke with her
25 for about an hour to an hour-and-a-half. That she

1 was frail, that she was upset and she was crying.
2 Of course they spoke with Heather McBurney. There
3 were only two people with that baby that day, Heather
4 and the Defendant.

5 After they spoke with Heather they interviewed
6 the Defendant. They told you that he was not under
7 arrest at the time. And that he agreed to speak
8 with them. And he told them that he and Heather had
9 been married for two years. That they had one child
10 Madison who was almost a year old. That Madison
11 suffered from hip dysplasia. That she was born with
12 that and she had to wear a brace. And he told them
13 that he had no other children. They asked him what
14 happened on November thirtieth (30th) of two thousand
15 and six (2006). He talked to them about Madison
16 throwing up through the day and not feeling well.
17 He said that, 'Heather left for work at about six
18 o'clock (6:00) and that Madison had been put down for
19 a nap just before that', as was their normal routine
20 because Madison was suffering from separation
21 anxiety. He told them that Madison was a bit cranky
22 but nothing out of the ordinary when she woke up.
23 And that he took her to the living room and put her
24 in the bouncy seat and gave her a bottle. He said,
25 'That she spit the bottle out.' That he took her to

1 the bedroom to change her. And he changed her
2 diaper, put on her pajamas and brace. That he sat
3 her on the floor while he was putting something away
4 and she began to have difficulty breathing and was
5 gurgling on her spit. He said, 'That it was normal
6 or common for her to gurgle on her spit.' He told
7 them that she fell backwards and began seizing, that
8 her limbs were rigid and she became unresponsive.
9 He said, 'Her limbs loosened.' He disrobed her
10 because he was having a hard time seeing if she was
11 breathing and he called nine-one-one (911). He told
12 them that he gave her rescue breaths. He said, 'The
13 fire department and an ambulance arrived and Madison
14 was taken to U. of M. Hospital'.

15 Sergeant Sovik asked the Defendant about
16 Nicholas Kennedy and the Northville Township
17 investigation. And his response was that Nicholas
18 Kennedy was not his son. Sergeant Sovik asked him
19 about the injuries to Nicholas and he said that he
20 wasn't responsible for the injuries to that child.
21 Sergeant Sovik asked how that child suffered or
22 sustained fractures. Asked if he had told Heather
23 about the investigation. And the Defendant said he
24 hadn't. When Detective Sergeant Sederlund told him
25 that the injuries sustained by Madison were the same

1 injuries that Nicholas Kennedy sustained, the
2 Defendant's response was, 'Those injuries were
3 worse.'

4 The Defendant admitted to them that he and
5 Heather were the only caretakers of Madison on
6 November thirtieth (30th) and in the immediate days
7 before that. Sergeant Sovik confronted the
8 Defendant and told him that there was medical
9 evidence that Madison had suffered from nonaccidental
10 trauma due to abuse. And the Defendant denied
11 responsibility for Madison's injuries. Sergeant
12 Sovik asked the Defendant if he was saying that his
13 wife, Heather, did this. And his response was, 'I
14 don't know. I can't believe that she would do
15 something like this.'

16 When asked what should be the penalty if this is
17 an accident his response was, he should have to go to
18 the funeral and burial. He claimed to the
19 detectives that a couple months prior, and you can
20 compare this to the St. Jo's Ann Arbor records which
21 were admitted into evidence, which are dated February
22 of two thousand and six (2006), but the Defendant
23 said a couple of months prior he was carrying Madison
24 in a bouncy chair. That it caught on furniture.
25 That she tipped out of the chair and fell five feet

1 and was taken to St. Jo's in Ann Arbor to the
2 emergency department. When you think about whether
3 or not that statement's credible, think about the
4 fact that Sergeant Sovik testified that the Defendant
5 is approximately five feet eight inches in height but
6 claimed that Madison fell from a distance of five
7 feet.

8 The Defendant said to the officers, 'My life is
9 over.' And Sergeant Sovik told him, 'I know you
10 caused these injuries. Tell us what happened.'

11 They asked him if it would be easier, uh ---
12 would it be easier to talk about this or tell this if
13 Heather was there. And he asked to see Heather.
14 Sergeant Sederlund continued to talk to the Defendant
15 while, excuse me, Sergeant Sovik continued to talk to
16 the Defendant while Detective Sederlund went to get
17 Heather. When she came back in the room she sat
18 down next to the Defendant. There was a statement
19 made and then the Defendant said, 'You knew about
20 Nicholas Kennedy?' And said he would have told her
21 but things were going well and moving quickly and he
22 didn't want to ruin it. And said, 'I made a
23 mistake. I threw her into the crib.'

24 Sergeant Sovik testified the Defendant said that
25 Madison had been difficult. That it had been hard

1 for him to deal with her. That he wished that
2 Heather had been put on a dayshift so they could tag
3 team Madison. And then he said, 'You know how
4 difficult it is for me to care for her due to her
5 separation anxiety.'

6 He was asked what happened in Madison's bedroom.
7 And he said he put her in the bouncy seat in the
8 living room. He gave her a bottle. She spit that
9 up. He picked her up. He took her back in the
10 bedroom. He changed her. Put her in her pajamas.
11 Put her brace on. And he said, 'She was screaming
12 and crying as this was happening.' That she
13 continued to scream and cry. That he attempted to
14 console her. Picked her up and she was screaming
15 and crying in his ear. And then he got mad and
16 frustrated and threw her into the crib. He said he
17 was about two feet away from the crib. And he said
18 he threw her into the crib and her head hit the bars.
19 The Defendant claimed she was immediately
20 unresponsive and seizing. And that he grabbed her
21 and tried to help her. That she was limp and having
22 trouble breathing and he disrobed her. That he
23 called nine-one-one (911) and he gave her rescue
24 breaths.

25 After the Detectives got that statement about

1 what had happened, they obtained consent to search
2 the home of the McBurney's where photographs were
3 taken and the crib was taken into evidence.

4 Now you heard testimony from Detective Sergeant
5 Paul Sumner of the Northville Township Police
6 Department who told you that in February of nineteen-
7 ninety-eight (1998) he was a detective for their
8 department. And he was assigned an investigation in
9 the early days of March of nineteen-ninety-eight
10 (1998) to investigate injuries received by a child by
11 the name of Nicholas Kennedy. He told you that he
12 went to Northridge Apartments off of Seven Mile Road.
13 And he spoke with the Defendant. The Defendant let
14 him come in the home. They sat at the kitchen table
15 and they talked. He identified the Defendant. And
16 he told you that the Defendant said, 'Nicholas
17 Kennedy was his son.' And that he didn't know how
18 he was injured. That at that point he gave the
19 story that at one time he was stepping over a child
20 seat while carrying Nicholas and tripped and fell but
21 Nicholas never hit the ground. Boy does that story
22 sound like something else, doesn't it? Then on
23 February twenty-seventh (27th) of nineteen-ninety-
24 eight (1998) he had watched Nicholas after work.
25 That he was the caretaker alone for Nicholas and when

1 Nicholas stopped breathing he called nine-one-one
2 (911). He wrote out a statement. You can ask to
3 look at that statement, People's Exhibit 7.
4 Sergeant Sumner said after he spoke with him he left
5 the Defendant's home and that later that day, in the
6 evening, he got a call from the Defendant. He
7 doesn't remember after almost ten years the nature of
8 that call except that the Defendant was coming up to
9 the police station to talk with him. He said he was
10 not under arrest. In fact after they spoke at the
11 police station the Defendant left on his own. Said
12 they spoke in an office. And at the point the
13 Defendant claimed to him that when Nicholas was a
14 month and a half old he accidentally dropped him from
15 his lap. And that the baby fell two to three feet,
16 landed on his back on the carpeted floor that's over
17 cement underneath. And that he didn't tell anyone
18 this had happened. Sergeant Sumner told you the
19 interview continued. The Defendant began to cry and
20 then he said that on February twenty-seventh (27th)
21 of nineteen-ninety-eight (1998) that he returned home
22 from working the midnight shift at about six-thirty
23 (6:30) in the morning. That his girlfriend,
24 Nicholas's mother, left for work at about seven a.m.
25 7:00am). That he tried to give Nicholas a bottle.

1 That Nicholas was upset and crying and he wouldn't
2 stop. The Defendant became frustrated and he began
3 bouncing and shaking the baby on his hip. And that
4 he called nine-one-one (911) after the baby stopped
5 breathing. Sergeant Sumner testified the Defendant
6 said he knew he was bouncing and shaking Nicholas too
7 hard. That it was harder than Nicholas's mother
8 would have done. And he knew that his actions
9 caused the injuries to his son. His written
10 statement at that point, People's Exhibit 8, was
11 admitted into evidence. And Sergeant Sumner told
12 you the Defendant didn't go into the detail in the
13 written statement that he gave in the oral statement.
14 And that that's not uncommon.

15 Ladies and Gentlemen, I encourage you to ask for
16 and look at the medical records of Nicholas Kennedy,
17 People's Exhibit 16. Ask yourselves if this sounds
18 familiar. Subdural hemorrhages, retinal
19 hemorrhages, subarachnoid hemorrhage, and in
20 Nicholas's case, skull fracture. The medical
21 records show that Nicholas Kennedy was between four
22 and four and a half months of age on February twenty-
23 seventh (27th), nineteen-ninety-eight (1998) when he
24 was admitted to Children's Hospital of Michigan.

25 There was a stipulation that Madison's body was

1 transported, that there was a chain of custody. On
2 December fifth of two thousand and six (2006) from
3 the University of Michigan Hospital to the Oakland
4 County Medical Examiner's office by Michigan Removal
5 Service.

6 You heard testimony then from Doctor Dragovic
7 who is the Oakland County Examiner. He's a forensic
8 pathologist and specializes in the area of
9 neuropathology, the pathology of the brain and the
10 nervous system. Unlike any other witness in this
11 case, Doctor Dragovic was able to see Madison's brain
12 and her body in ways that a treating physician
13 doesn't get to look at because they're trying to
14 maintain and preserve life.

15 He told you that his autopsy revealed that
16 Madison had what he called an old, or remote bleed
17 and a new bleed. And you'll recall he talked about
18 the word organizational or organizing, the process of
19 healing. And he said that the old bleed was
20 organized. It had completed organization. He said
21 that it was approximately three to four months,
22 possibly beyond. And he said there was no
23 scientific way to accurately gauge the age. He told
24 you that the new bleed was organizing and it was days
25 old from Madison's, the time of Madison's death.

1 He said she suffered from severe brain swelling
2 due to reaction to blunt trauma of the head that was
3 the cause of her subdural bleed. And she suffered
4 the complications, infarcts, necrosis and herniation.
5 He found evidence of hemorrhaging to the retinas of
6 both eyes. And he told you, and it's in the autopsy
7 protocol, that there was an epidural bleed in the
8 spine, below the neck to the upper back area that is
9 indicative of blunt force trauma to that area of the
10 back. He testified that the cause of Madison's
11 death was blunt force trauma and its complications.
12 And he tried to explain to you the difference between
13 --- or what blunt force trauma is. You'll recall he
14 talked about an unyielding surface. If you remember
15 first, he demonstrated with the doll up here on the
16 bar. And then he got up and he demonstrated with
17 the doll several times on the crib. And he talked
18 about that unyielding surface. That when the head
19 impacts with a surface that does not yield or give
20 way that there's a lag of the brain. And the sudden
21 snapping movement will create ripping of the blood
22 vessels that result in bleeding.

23 He testified he has done numerous autopsies.
24 And he told you that it is not unusual not to find
25 bruising or external injury to a body or to find

1 injury inside the body from blunt force trauma.
2 That some types of padding can protect the body from
3 fracture or bruising or laceration. He told you
4 that Madison's injuries were consistent with a child
5 being thrown into a crib from two feet away and
6 hitting the head against the wooden slats. He told
7 you that her manner of death is homicide. That this
8 was a purposeful act of another person. Remember,
9 Madison McBurney was not crawling. She was not
10 trying to pull herself up. She was not walking.
11 This child was not ambulatory. In many ways for a
12 child her age she was disabled and she relied on
13 another human being, an adult, to move her around
14 with the exception of being able to push herself up
15 and to let herself down.

16 He told you that Madison was rendered brain-dead
17 by these injuries. That there was no evidence of
18 infection from his autopsy. And the MRSA and the
19 skin congenital problem and the hip dysplasia had
20 nothing to do with her cause of death. And he told
21 you based on Madison's physical impediment, he knew
22 she didn't do this to herself. That she could not
23 have climbed up on something and fallen or jumped
24 down off of something.

25 He was asked questions about how much force is

1 necessary to cause this injury. And he testified
2 the outcome is the reflection of the force. That
3 you can't actually conduct a physical measurement of
4 it but you know based on the outcome. And in this
5 case you know how serious Madison's injuries were.
6 He told you that subdural hematomas do not
7 spontaneously rebleed, that some force is required.
8 You'll recall he was asked repeated questions about
9 diffuse axonal injury and hypoxic-ischemic injuries.
10 And he said those terms are often mixed-up and it
11 takes an autopsy and an actual examination of the
12 brain to sort it out. He said in Madison's case
13 these injuries were not a result of the loss of blood
14 or oxygen supply. He knows from the autopsy from
15 looking, from fixing the brain in formalin and
16 conducting an examination. And you saw the pictures
17 of how detailed that examination of the brain was.
18 And he even testified that they went on to do a
19 microscopic examination. He said the blood and
20 oxygen supply was lost as a result of the consequence
21 of the blunt trauma to Madison's head.

22 He told you Ladies and Gentlemen, that that old
23 blood, that chronic or remote hematoma, that that is
24 not normal. That's abnormal to that subdural space,
25 that subdural space. And it got there as a result

1 of trauma.

2 Now Ladies and Gentlemen, you heard from some
3 defense witnesses in this case. Sharon Klump and
4 Lynn Peterson, very nice ladies that worked for
5 Pitter Patter. But they only knew this family and
6 this baby for six weeks. They testified that they
7 would see the Defendant in the morning when he
8 dropped her off. They never saw any signs of
9 separation anxiety although Heather McBurney
10 testified about the separation anxieties but they
11 never saw Madison on November thirtieth (30th). In
12 fact, they recall after there was a diagnosis of
13 MRSA, sometime around November thirteenth (13th) or
14 fourteenth (14th), if you rely on your memories for
15 the day, that Madison didn't return to the daycare.
16 So they didn't see her November thirtieth (30th) or
17 the days immediately preceding that. And they had
18 no idea how the Defendant behaved when he was alone
19 with Madison.

20 You heard testimony from Heather McBurney's
21 father, Gary Linville who told you that he heard the
22 Defendant tell two different stories. That the
23 Defendant told him that he'd been changing Madison's
24 clothes in the living room, went back for an outfit
25 and the baby fell over and went into convulsions.

1 But at another point in the hospital when there were
2 some friends there, he heard the Defendant say that
3 he'd been changing Madison's clothes in the bedroom
4 and she went into convulsions.

5 What is it that our mothers used to say about?
6 If you tell the truth you don't have to remember it
7 because it's the truth. It's the lies that are
8 difficult to remember.

9 Now I don't have much to say about Doctor
10 Uscinski's testimony. This is a man who goes around
11 the country and testifies. Testifies only on behalf
12 of the defense. He testified he has never testified
13 on behalf of the prosecution. He goes around and he
14 testifies about children that he's never seen, that
15 he's never touched, that he's never treated. He
16 wants to tell you that he knows better than Doctor
17 Maher, who was the pediatric neurosurgeon, who did
18 the procedure on Madison and treated her. He wants
19 to tell you that he knows better than Doctor Ibrahim
20 who is a pediatric neuroradiologist. Unlike Doctor
21 Uscinski, Doctor Ibrahim is board certified in the
22 area of pediatric neuroradiology. Recall Doctor
23 Uscinski is just simply a neurosurgeon and that he
24 doesn't even specialize in children. He treats
25 children and adults. And he wants you to think that

1 he knows better than Doctor Dragovic, a forensic
2 pathologist, a neuropathologist. Recall how many
3 autopsies Doctor Uscinski said he's personally done.
4 I believe the answer was, 'Zero.' He knows better
5 than the man who looked at Madison's body, who fixed
6 her brain in formalin and had to examine her brain,
7 and who looked at microscopic slides of Madison's
8 brain. He knows better. Doctor Uscinski wasn't
9 present for any of these things. And he didn't call
10 and talk to any of these people. He made some
11 reference to bumping into Doctor Dragovic a week or
12 so before the trial at a conference. He didn't call
13 and talk to him about his findings and ask questions
14 and ask to look at things.

15 The Defendant had to go a long way to find
16 somebody who would dispute these doctors. All the
17 way to Maryland or Virginia for twelve (\$12,000) or
18 thirteen thousand dollars (\$13,000) of his time.
19 And recall how much of an argument he had to give me
20 about was he getting paid for his time or his
21 testimony, instead of just coming out and saying,
22 'I'm paid this.' Apparently you can get anyone to
23 say anything for enough money. Although in Doctor
24 Uscinski's case it's not just anything is it? He
25 has a pattern of testifying that it's a chronic

1 subdural rebleed. Forgetting the conflicting
2 statements by the Defendant. Forgetting the fact
3 that there was an epidural hemorrhage to the spine.
4 Forgetting the fact that there was a subarachnoid
5 hemorrhage that's in a different space than the
6 subdural. This man for that much money and his
7 thirty (30) hours couldn't even remember the sex of
8 this child when he testified. He told you this was
9 a boy. He kept calling Madison he.

10 You heard testimony from Doctor Adams who was
11 Madison's pediatrician. He told you that he saw
12 Madison since she was about a week or two old. That
13 every time with the exception of one time, Madison
14 was with her mother. And now that one time she was
15 with her father. He told you that he was never told
16 about the February twenty-sixth (26th) incident when
17 Madison was taken to St. Joseph's Hospital and
18 emergency room in Ann Arbor. Never received any
19 medical records. Was never given that in a follow-
20 up history. He testified he was never given a
21 history of any accidents to Madison or any falls.
22 And he told you those symptoms that Heather McBurney
23 testified about that happened on November thirtieth
24 (30th), those are consist with the stomach flu too.
25 He told you that as a practice he would check --- he

1 would check the fontanel or soft spot during her
2 physical exam and he was never concerned with that.
3 And he told you that, 'You don't throw infants
4 because injuries can happen.'

5 Now the Defendant is charged with Felony Murder.
6 And remember again we talked about this crime being
7 made up of parts. And it's the responsibility of
8 the People to prove each and every part or element of
9 this crime beyond a reasonable doubt. And that's
10 all we have to prove.

11 The first part or element that the Defendant
12 caused the death of Madison McBurney. How do you
13 know that the Defendant caused her death? You know
14 this because on November thirtieth (30th) of two
15 thousand and six (2006) when Heather McBurney left,
16 her daughter was fine. She was in her crib. She
17 was playing with a toy. She kept food down. She
18 seemed back to normal. You know that this child,
19 that Madison, was alone with the Defendant during
20 that period of time. And that shortly after seven
21 p.m. (7:00pm) now suddenly Madison is nonresponsive.
22 Within three minutes the first responders are there.
23 And don't forget the Defendant said he'd been giving
24 her rescue breaths. They give her oxygen. She's
25 put in an ambulance. She's taken to University of

1 Michigan Hospital. And she's given medical
2 treatment. They do everything they can think of to
3 help her within reason. But by December fourth of
4 two thousand and six (2006), Madison is dead.

5 MR. WHITE: Your Honor, I'm going to
6 object to this illustration. This does not
7 correctly state Jury's instructions. It doesn't.
8 There's matters that are omitted here Judge. And if
9 she's going to put up what you're going to instruct
10 the Jury, I'd ask that it be word for word. This
11 does not.

12 MS. POPE-STARNES: Your Honor, this is a
13 demonstrative Exhibit. As I indicated in opening to
14 the Jury they have to rely on the instructions of the
15 Court. And I will explain to the Jury why I am only
16 listing one of the mens rea requirements on two.

17 THE COURT: Ladies and Gentlemen, I will
18 just let you know also that I will be reading the
19 full instructions to you. This is comprehensive.
20 Umm --- just keep that in mind, okay?

21 Go ahead Counsel.

22 MS. POPE-STARNES: Thank you.

23 Now again, what evidence do you have of the
24 cause of death? You know from the autopsy the cause
25 of death was blunt force trauma. There are old and

1 new hematomas, subdural and subarachnoid. You know
2 that there is new hemorrhaging to the spine area that
3 is consistent with blunt force trauma. Doctor
4 Dragovic told you that force is necessary to do this.
5 And this child was not ambulating. Someone had to
6 have done this to her. And the Defendant said, 'I
7 threw her into the crib.'

8 Now number two, the state of mind. Now the
9 Judge will read you this instruction that talks about
10 that we have to prove the Defendant had one of three
11 states of mind, the intent to kill, the intent to do
12 great bodily harm, or knowingly create a very high
13 risk of death or great bodily harm knowing that death
14 or such harm would be the likely result of his
15 actions. The one I want to ask you to focus on
16 because I only have to prove one of those three not
17 all three is the one that I have on this
18 demonstrative Exhibit. That the Defendant knowingly
19 created a very high risk of great bodily harm knowing
20 that such harm would be the likely result of his
21 actions.

22 How do you know that? Doctor Adams told you,
23 'You don't throw babies because they can get hurt.'
24 Ladies and Gentlemen, everyone knows we don't throw
25 babies because they can get hurt. And that

1 Defendant knows it better than anyone else because in
2 nineteen-ninety-eight (1998) he injured a child with
3 fractures and hematomas and retinal hemorrhaging.
4 He knows personally. He's done it before. He
5 knows great bodily harm can result to a child from
6 rough handling because he's done it before. He's
7 not a new father that has a brand-new baby and he
8 doesn't know what to do. He's someone who has done
9 this before, these same types of injuries. He knew
10 what the likely result of that was.

11 And Ladies and Gentlemen, if he wants to argue
12 that he didn't know that she had a preexisting
13 condition, look at the Defense Exhibit BB where
14 Doctor Adams talks about in his Exhibit and talks
15 about on the stand, he told the Defendant the results
16 of that MRI from August thirty-first (31st) of two
17 thousand and six (2006). It says right in this
18 medical record, lipoma or blood. And that man knows
19 what blood in a baby's brain means because he has
20 experience in this. He knew of that risk.

21 Look at the pictures of this bedroom. Ask to
22 see these pictures. This bedroom is filled with
23 furniture and toys. A bed, a chair, a changing
24 table, a swing, toys. No matter where he threw her
25 in that room she was going to get hurt.

1 And remember what Doctor Dragovic said. 'You
2 can't give a mathematical measurement to the force
3 used but the outcome is a reflection of the force.'

4 And finally in order to prove felony murder, the
5 People have to prove that when the Defendant caused
6 the death of Madison, he was committing the crime of
7 child abuse in the first degree.

8 Now let's talk about child abuse in the first
9 degree. Two of these elements are uncontraverted.
10 It is uncontraverted that he was the father of
11 Madison McBurney. And it is uncontraverted that
12 Madison was under eighteen (18) years of age. So
13 all that leaves to prove is that he did knowingly or
14 intentionally cause serious physical harm. The
15 statement was not, 'That he dropped her. That she
16 slipped out of his hands. That he lost control of
17 her.' But it was, 'That he threw her.' Throwing
18 is an intentional act. It's not an accident. It's
19 intentional. He knew he would cause serious
20 physical harm.

21 Now the instruction talks about the definition
22 of things that are serious physical harm, including
23 but not limited to brain damage, or skull or bone
24 fracture, subdural hemorrhage or hematoma,
25 dislocation, sprain, internal injury, poisoning,

1 burns, scalds, or severe cuts. Brain damage.
2 Madison suffered brain damage. Subdural hemorrhage
3 or hematoma. There's testimony of that. Internal
4 injury. The hemorrhage to the spinal area which
5 Doctor Dragovic says is caused by blunt force trauma.
6 He knew this would cause serious physical injury and
7 he knew because he's done it before. He knows what
8 the rough handling of an infant results in.

9 Now you're also going to be given instruction
10 about a lesser offense of second degree murder.
11 That he has to prove --- that we have to prove that
12 he caused the death of Madison. And again,
13 remember we talked about those three states of mind.
14 And that we only have to prove one of those three.
15 And the one I ask you to focus on is that he
16 knowingly created a very high risk of great bodily
17 harm, knowing that such harm would be the likely
18 result of his actions. He knew. He never told
19 Heather because he knew. He lied about it because
20 he knew.

21 You're also going to get an instruction on
22 involuntary manslaughter. And I ask you to listen
23 very carefully to that. And I'm not going to go
24 through the details of that. But one of the
25 requirements is that the Defendant acted in a grossly

1 negligent manner. Ladies and Gentlemen, this is not
2 a case of gross negligence. We are not talking
3 about somebody that's playing with a child, maybe
4 swinging them around and isn't doing it in a safe
5 area, is grossly negligent and the child gets
6 injured. We're talking about an intentional act.
7 Throwing is not an accident. He never claimed he
8 dropped her or lost control of her or that she
9 slipped. He said he threw her. It's an
10 intentional act. It's not gross negligence. It's
11 intentional.

12 Now it's clear from the testimony in this case
13 that the defense is going to argue that this was an
14 accident. What evidence do you have to show that
15 this was not an accident?

16 They offered testimony through Doctor Uscinski
17 that there was a chronic subdural hematoma that bled,
18 re-bled. It was possibly spontaneous and could
19 happen with a cough or a burp.

20 Doctor Dragovic told you that some force is
21 necessary. And you can tell, you can gauge the
22 force by the outcome. This child had extensive
23 injuries to her brain. Look at the autopsy
24 protocol. Look at the medical records. And recall
25 Doctor Maher, the neurosurgeon from University of

1 Michigan talking about the extent of this child's
2 injuries. And how this is so inconsistent with a
3 chronic rebleed because her injuries were so
4 extensive.

5 When you think about whether or not this is an
6 accident, think about how many different statements
7 the Defendant made. If this was an accident tell
8 the truth from the beginning. Why not tell the
9 truth? If you didn't do anything wrong, why not
10 just tell the truth? Why the need for all these
11 different statements?

12 When you're wondering about whether this was an
13 accident and you're considering that, think about the
14 conflicting statements he made in Nicholas's --- the
15 investigation involving Nicholas Kennedy. First
16 denying any injuries. Then giving some stories
17 about tripping or about Nicholas falling off of his
18 lap accidentally. When you think about those, think
19 about was he even completely truthful in his last
20 statement where he claimed that he was shaking and
21 bouncing the baby too hard on his hip. Because
22 remember Doctor Dragovic, I believe it was, talked
23 about what it takes to cause a skull fracture.
24 Something more was done to Nicholas to actually
25 fracture his skull.

1 This was not an accident. This Defendant knows
2 what rough handling of an infant can do. He knows
3 the likely result of these actions is great bodily
4 harm. Remember. How did he describe Nicholas's
5 injuries compared to Madison's? Those were worse,
6 except Madison's dead.

7 Ladies and Gentlemen, Madison McBurney deserved
8 better than this. This was a baby who was born with
9 a little congenital skin disorder to her scalp. She
10 was born with hip dysplasia which in some ways
11 disabled her for a child that age. Couldn't learn
12 to crawl, pull herself up or walk by eleven months.
13 Had to rely on her parents and her caretakers to move
14 her. This baby deserved better than this. She
15 deserved to be treated with gentleness and care.

16 And what ways do babies have to communicate with
17 us when something's wrong? When they don't feel
18 good or they're hungry or when their diaper is wet or
19 dirty? They cry. And a crying baby is no reason
20 to throw them. And this Defendant knew from
21 Nicholas Kennedy, his son, and the injuries that
22 Nicholas sustained as a result of what he did to
23 Nicholas what the likely result of his actions were.

24 Ladies and Gentlemen, we have proven each and
25 every element of the crime of felony murder, and

1 first degree child abuse in this case. And I would
2 ask you to find the Defendant guilty as charged.

3 Thank you.

4 THE COURT: Thank you.

5 Mr. White.

6 MR. WHITE: On behalf of my client, Mr.
7 McBurney, I also wanted to thank you for your
8 patience in this very lengthy trial in which there's
9 been a lot of complicated medical terminology. And
10 there is --- you're involved in the decision
11 involving a real human tragedy. Not TV, not
12 magazines, not somebody else. You are involved in
13 interpreting and deciding facts and how the law
14 applies to these facts. And a loss that as a parent
15 you can have no greater. No one should ever, ever
16 outlive their children at any age. Umm --- the
17 length we can all agree though is necessary if ---
18 because matters of such importance are involved. I
19 think it's better to err on the side of caution.

20 I told you from the beginning during the Jury
21 selection this would be very challenging, both
22 viscerally in your guts and intellectually because it
23 involves the death of a baby. It involves the ---
24 it involves a father accused of murdering her. It
25 involves a father who had prior child abuse

1 investigation ten years ago.

2 And I ask you at the outset your willingness to
 3 separate the emotion that's created by those charges
 4 and the prior investigation from the application to
 5 the --- of the facts of the law of this case. And
 6 what I do believe that you've been able to see is
 7 there is a difference between actual facts and
 8 evidence. And there is a difference between truth
 9 and ambition. And there's a difference between the
 10 fair presentation of the facts and circumstances
 11 involving Madison's death and the desire to win at
 12 all costs.

13 Now before I comment on the prosecution's
 14 proofs, I will tell you from the beginning that
 15 Steven McBurney is a careless man. Careless. He
 16 was careless with Nicholas. He was careless with
 17 Madison. And on November thirtieth (30th) he did a
 18 stupid thing. He threw her into her crib where she
 19 hit her head on the mattress. Deplorable parental
 20 discretion. However this is a charge of murder.
 21 First degree felony murder and first degree child
 22 abuse. And what has done --- and what the
 23 prosecution has done with manipulation of evidence is
 24 suggest to you that carelessness is murder, is an
 25 intent to cause death, great bodily harm or knowingly

1 create the high risk of death or great bodily harm,
2 knowing that that result would occur.

3 And they would like you to arrive at this
4 conclusion based upon the emotion that's engendered
5 from an old --- ten-year-old case and the uh ---
6 Nicholas Kennedy's injuries. That should be the
7 emotional impetus for you to forget about the facts
8 in this case. To overlook the unrebutted evidence
9 that Madison's death was accidental.

10 What the prosecution is suggesting is careless
11 once, can't be careless twice. It has to be
12 something else. And that they ask you to uh ---
13 reach that conclusion based upon emotion and not
14 intellectual dissection of the evidence in this case.

15 The first question I ask for you to ask
16 yourselves when you go back into the Jury room is,
17 has the prosecution been fair with the presentation
18 of evidence? Have you got a fair umm --- picture of
19 the evidence both inculcating, that is indicating of
20 guilt, and exculpating, indicating innocence.

21 The first question I ask you to ask yourselves
22 is, why didn't the police in either case produce the
23 actual recorded statements of Steven McBurney? Why
24 did Detective Sumner emphatically deny on his
25 examination that he recorded Steve on March second,

1 nineteen-ninety-eight (1998) when he came into ---
2 into the police station? Yet when confronted with
3 his prior testimony says, 'Oh yes. I remember. I
4 had a recorder but I stuck it in my pocket. I
5 thought I put the tape in correctly.' But it turned
6 out after the interview was over he discovered that
7 he had put the tape in wrong and it didn't record.
8 Why did he boast that the law does not require a
9 recording? Why do Steven's written statements not
10 reflect the statements that he allegedly made to
11 Detective Summer --- Sumner that day? Why is there
12 no mention of shaking Nicholas? Why does --- does
13 Steven admit that he dropped Nicholas on a carpeted
14 cement floor? Why does Nick --- Steven only say
15 that he shook Nicholas, excuse me, he bounced
16 Nicholas too hard on his hip, harder than what the
17 mother, Christa, normally did?

18 Because that's what was said as Detective Sumner
19 stood over him. And that was --- which was done.
20 There was accidental injury in Nicholas Kennedy.
21 Accidental, ten years ago. And no matter how
22 difficult, how alarming those injuries may seem,
23 there's nothing to indicate that they're more ---
24 nothing more than accidental. And look at the
25 medical records. Look. Nicholas had skull

1 fractures indicative of being dropped on a carpeted
2 cement floor. He had chronic blood loss indicating
3 old blood from just like you learned in this case,
4 old blood.

5 That is the impetus the prosecution wants you to
6 have in determining that Madison's injuries were
7 intentional. Why didn't Sederlund and Sovik produce
8 the recorded statement, the actual recorded
9 statement? Why haven't they? Why have they
10 continually denied it? Why did they make ---
11 testify that they made, you know, in their big case,
12 their first big case, they made some half-hearted
13 effort to get a recorder. Looked in a drawer,
14 looked, you know, and then that was supposedly the
15 end of it. Knowing they're going to interview
16 doctors. Knowing they're going to interview both
17 parents. Knowing that this is a case of potentially
18 extreme medical complexity, why wouldn't they do
19 something else? Seven-thirty (7:30), eight o'clock
20 (8:00) on a Saturday night. Here they're suggesting
21 the South Lyon Police Department has no recording,
22 viable recording devices. Why wouldn't they just
23 stop at Best Buy? Why wouldn't they go --- they
24 went to the Northville Police Department. Why
25 wouldn't they ask them for a recorder? They were at

1 the University of Michigan Hospital. You know, why
2 wouldn't they ask?

3 Well because they didn't have to because they
4 had a recorder. They recorded his statement. And
5 you can see from what happened with Sumner and what
6 with these two, it's a police trick to be able to
7 say, 'Well when an accused makes incriminating
8 statements but we don't have enough, we'll just say
9 we don't have a recording. We'll just have our
10 notes which we'll later say are shredded. And then
11 uh --- then the accused is unable to defend himself
12 from statements that we say he made but he didn't.'

13 However, I ask this. Why did Kevin Schuldt
14 come in here and say, conveniently after the break,
15 that he could not remember if Detective Sovik asked
16 to record him on December second? Was that being
17 fair with you? Why would Detective Sederlund say he
18 sat across from Sovik for three-and-a-half hours
19 covering Steve's interview and not be able to say
20 whether Sovik took one single note? Why would Sovik
21 say in April when he's testifying in this case, last
22 April, that he had his notes, they were around the
23 station somewhere but then later sign an affidavit
24 that they were shredded immediately upon the
25 completion of the police report? Why would both

1 police officers put in their joint police reports
2 that upon Heather returning to the room Steven made
3 two quotes that are in quotes in the police report?
4 "I made a mistake. I threw her into her crib."
5 Only things quoted. Only things said.
6 Now it's not a coincidence Ladies and Gentlemen
7 that what Heather can remember of that joint
8 conference is exactly what is in quotes in their
9 statement and their report. Steve said, 'I made a
10 mistake. I threw her into the crib.'
11 Now what motivation would Heather have to say
12 that she believed Sovik had a recorder? She heard
13 it. She saw it on his person. She saw it on the
14 floor when they were talking alone. Why wouldn't
15 the words, mad, screamed, screamed in his ear, two
16 feet away, hit her head on the rails, why wouldn't
17 all those be in quotes? Why if he really said those
18 words, knowing that they had been told by the
19 University of Michigan Doctor Fleming that Madison
20 was suffering from shaken-baby syndrome, why wouldn't
21 and there had been supposedly told that she hit her
22 head on one of the rails, why wouldn't they
23 immediately order forensic tests done of that crib to
24 determine whether there's any evidence of impact, any
25 evidence whatsoever? Because remember, after those

1 statement's supposedly made, they stepped out of the
 2 room, called the Prosecutor, and then got consent to
 3 search the home and confiscate the crib. If those
 4 statements were made, they certainly would have
 5 ordered a forensic analysis of that crib because
 6 that's evidence. And that's evidence if it's there.
 7 If it's evidence indicating guilt. If it's not
 8 there, it's evidence indicating innocence.

9 Why would Matt Calus, the young EMT, come in and
 10 say in his direct testimony that the father gave no
 11 history regarding the child being ill that day? Why
 12 would he say that when it's right in his report,
 13 child, excuse me, father indicated that child was
 14 sick throughout the day? Excuse me. Child ---
 15 father indicated that the child was vomiting
 16 throughout the day. Why minimize this issue
 17 regarding the respiratory distress that Madison was
 18 in? And believe me, you've heard it over and over
 19 again. They want to suggest that she was somehow
 20 properly oxygenated. Why? Because lack of proper
 21 oxygenation in a situation like this causes the brain
 22 to swell. Why would they minimize this through this
 23 kid's testimony when according to the firefighter
 24 Schuldt, who was in the --- in the ambulance said,
 25 'The child was in a state of extreme respiratory

1 distress'?

2 They were scrambling. She was bag-valve
3 masked, being oxygenated. That was not enough.
4 They couldn't intubate her. Her pulse was dropping
5 to seventy (70) beats per minute.

6 And why this suggestion that there's
7 inconsistent histories regarding the child's medical
8 condition under these extremely frantic situations?
9 Craig Johnston saying that, 'There was no indication
10 from the father whether the child had MRSA or was on
11 any antibiotics', when it's clear that it was said?
12 It was said to Kevin Schuldt. It was clear why?
13 Because why? Why is this being done? Because they
14 don't want to be fair with the presentation of the
15 evidence. And again, remember, this is just ---
16 these are split-second decisions. A lot is going
17 on. Nobody is taking notes.

18 Now with the doctors that testified from
19 University of Michigan it's interesting, in fact,
20 it's compelling, that the prosecution would suggest
21 to you that Steven McBurney must have known that his
22 actions would cause serious physical injury to
23 Madison because of her preexisting condition that he
24 was informed of on her August thirty-first (31st) or
25 after the August thirty-first (31st) MRI.

1 Well if that's true, why didn't any University
2 of Michigan doctor, who at any time read that MRI,
3 know the same thing? Why? If Steven should have
4 known, being told that she had possible blood
5 products on her brain or a lipoma, why wouldn't the
6 doctors from U. of M. know also that this is
7 potentially a critical situation? Why? Why?

8 You'll answer that question why.

9 The word is hubris. It is a Greek word for
10 pride. Not just pride but pride above mistake. It
11 is replete throughout our history that those who
12 believe they are beyond mistake are dangerous people.
13 And it's clear from the testimony of the doctors at
14 U. of M. they have to be beyond mistake in this case.
15 They have to be. They have to suggest that this was
16 somebody's fault other than their own. They have
17 to. That is why Doctor Sikavitsas would argue with
18 me about the meaning of the word verbatim which is,
19 you know, I know the medical training is different
20 from the legal training and maybe we all come in
21 contact with that word probably in eighth or ninth
22 grade. It means word for word.

23 Why would she say in her uh --- remembering of
24 the history the father said, 'She had been vomiting
25 since the previous day'? Why? Is there a

1 possibility she misheard things? Is there a
2 possibility we have a critically ill injured child
3 that maybe you're not hearing things right? Why
4 would they put --- why would this doctor put this
5 mistake on Mr. McBurney when it possibly could be her
6 own? Why would she minimize most importantly the
7 respiratory distress of the child knowing that the
8 child was not breathing properly? Had failed
9 intubation. In fact, this doctor also could not
10 intubate initially.

11 Now you look at the records. Please look at
12 all the Exhibits, prosecution's and defense.
13 Exhibit Number 1 is the University of Michigan's
14 records. The child arrived at seven-fifty-five
15 (7:55) in the emergency department. Intubation was
16 not completed until after eight-fifteen (8:15). The
17 nine-one-one (911) call was at seven-nine --- the
18 child got up at seven (7:00). The nine-one-one
19 (911) call was at seven-nineteen (7:19). Arrival
20 was at seven-twenty-two (7:22). For almost an hour
21 that child would not have a proper oxygen supply.
22 Why has that been minimized? Why? Because they
23 wanted to put --- they wanted to put Steven in the
24 worst light possible. It has to be all his fault.
25 It can't be their fault. It can't.

1 Why would Doctor Maher minimize the differential
2 diagnosis to fail to include a chronic subdural
3 hematoma, bleeding disorders, large intra-axial
4 spaces, possible infection? Yet this doctor also
5 acknowledged upon cross-examination that a chronic
6 subdural hematoma can spontaneously rebleed. And
7 remember that this is at the point of the
8 prosecution's proofs. Now we took some witnesses
9 out of order because of the scheduling and
10 everything, that the prosecution is still pounding
11 that there's no new blood after the --- after August
12 thirty-first (31st) to September eleventh (11th) CAT
13 scan shows that all that blood went away, in fact, a
14 clear CAT scan, suggesting that there was continuing
15 injury after September eleventh (11th). Yet Doctor
16 Maher indicated that these signs that Madison had
17 that day, the vomiting including projectile, the
18 lethargy, the clinginess (sic), the lack of being
19 herself, these are all indicative of traumatic brain
20 injury. Symptoms of traumatic brain injury.

21 Doctor Dev, the head of the child protection
22 team, whose scientific opinion is --- is valued by
23 many but who would suggest to you on her direct
24 examination that four different histories were given.
25 And that simply was an inaccurate misleading

1 statement. She only heard one. As a scientist
2 that's all she could testify to. But she could read
3 the records and see that other statements were
4 recorded from --- by other doctors. And what was
5 said? She didn't know. Why is that being said?
6 Why is that being said? As if not only Steve but
7 Heather is misleading people as to the circumstances
8 of Madison being there, to put blame on Heather, to
9 discredit her. The parents. The parents.

10 She said, 'The parents never told me about the
11 MRSA.' Yet you look in those hospital records, the
12 nurses arriving --- the arriving nurse's record
13 clearly indicated MRSA. The doctor who saw uh ---
14 Madison initially in pediatric intensive care, the
15 workup regarding the history was extensive including
16 MRSA, including taking Bactroban for MRSA, the
17 antibacterial ointment. She would suggest to you
18 that despite all these other people, that the parents
19 said to her on December first, 'Madison was well all
20 day.'

21 And Bactroban being used for the aplasia which
22 is the congenital birth defect. And her response to
23 me when I asked her, 'Could you have made a mistake,'
24 was on most occasions like a little teen-age, 'That's
25 what they said.' Well that's not what they said.

1 The doctor made a mistake. But she must be above
2 mistakes because it's somebody else's fault. It's
3 Steve. It's Heather. Why would she claim --- why
4 would she claim that all the blood was gone when you
5 can see it from the nine-eleven (9/11) CT scan? Why
6 would she claim that? Why would she say, 'That
7 there's no evidence to suggest that Madison was not
8 properly oxygenated'?

9 Why would Doctor Odetola come in and say that he
10 suggested the craniectomy. And Doctor Maher
11 testified that it was discussed. The parents made a
12 decision. Yet he didn't feel strongly enough about
13 it to seek legal counsel. Is this just putting the
14 blame on the parents? And why do we have this last
15 doctor come in and testify after being contacted last
16 week about this case. Last week. Read the films.
17 Hurry it up. We need some testimony. And he
18 didn't look comfortable. And I don't think he
19 directly misled you but I also don't believe that he
20 understood why he was here. Because what he was
21 supposed to testify that the uh --- blood that was in
22 the CAT scan on November thirtieth (30th) was all new
23 from September eleventh (11th). He didn't do that.
24 He didn't do that at all. He said, 'That blood was
25 old, old. Three, four, five, six, seven months

1 old.' And it was in the same spot as it was on
2 August thirty-first (31st).

3 And I'll ask you this. This is --- this is
4 critical. Why is the defense being put in a
5 position of being the first and the first witness to
6 actually put up the film? Why are we --- why do we
7 have to prove our innocence by actually putting up
8 the MRI's and the CAT scans to show you --- show you
9 exactly where the blood was on August thirty-first
10 (31st)? On September eleventh (11th) where the
11 differential spinal fluid was still in the brain?
12 Indications of blood on November thirtieth (30th) CAT
13 scan?

14 The Exhibits that you have to go in the Jury
15 room are smaller but these have been blown up. Why
16 are we the first ones to show you the blood that was
17 here (indicating), that was ignored? That was still
18 on August thirty-first (31st). September eleventh
19 (11th). And why didn't the last doctor, Doctor
20 Iverson (sic) put up the September eleventh (11th)
21 CAT scan to show you if it was supposedly clear?
22 Well obviously he couldn't because he said, 'The
23 blood was old.'

24 September, excuse me, November thirtieth (30th).
25 The blood in the same locations only expanded from

1 August thirty-first (31st). So that was the first
2 testimony that you heard that the actual reading of
3 the CT's and MRI's showed an existence of chronic
4 subdural hematoma. And isn't it interesting that a
5 prosecution did not ask one question of Doctor
6 Uscinski of a substantive nature? Not one question
7 about his reading of the MRI of eight thirty-one
8 (8/31), of September eleven (11) CT scan, of November
9 thirty (30). Why? Why didn't she ask one
10 question? Instead it was a personal attack on him
11 as a person, as a neurosurgeon, as a umm --- hired
12 gun. Uh --- her prior case of the eighty (80) to
13 eighty-five (85) other cases that he's testified in
14 involving pediatric injuries. The eight or nine he
15 had diagnosed a chronic subdural hematoma.

16 Why didn't the prosecution consult his own
17 medical examiner before the personal attack on Doctor
18 Uscinski who was the witness last Friday morning who
19 testified that clearly Madison had a remote subdural
20 hemorrhage in existence for three, four, five, six,
21 seven as late as eight months? So the prosecution's
22 theory of the case must then change because we can't
23 say, 'That there's all new blood since September
24 eleventh (11th).' We have to say something else.
25 We have to say that, 'Well there's old blood but it

1 doesn't make a difference.'

2 Now Doctor Dragovic said that, 'Madison's
3 injuries were as a result of blunt force trauma,'
4 although he could not say what part of the back of
5 the head. He couldn't say how much force. He
6 couldn't say what angle. He could not say what
7 surface. He could not say what trajectory. He
8 just said, 'The swelling that started was started as
9 a result of a traumatic event.' Although he did
10 tell you very candidly, 'That Madison was in a
11 vulnerable state because of her existing remote
12 subdural hemorrhage.' And it would take less force
13 than it would normally under those circumstances to
14 cause the trauma giving rise to the swelling which
15 gives rise to the continued loss of blood to the
16 brain which is a vicious circle cycle then causes the
17 brain to swell down the openings of the lower part of
18 the skull and into the brain stem which controls the
19 vital organs.

20 Now Doctor Maher and Doctor Dev begrudgingly
21 admitted that chronic subdural hematomas can rebleed
22 spontaneously. Medical fact. Doctor Uscinski
23 testified to that. Doctor Dragovic would not go
24 that far. Said, 'It must have been as a result of
25 some trauma.' How much the statement was, 'Well the

1 damage done determines the force.' That doesn't
2 sound very scientific. But we do know this. There
3 is no signs of any trauma whatsoever to the skull.
4 None whatsoever. And he did not say that it was
5 blunt force as a result of the child hitting the
6 rails when he testified here. No. He testified to
7 that in April. Now he's testified that it must have
8 been a padded surface because we have no skull
9 fracture. We don't have a bruise. We don't have
10 anything to indicate that the child's, Madison's head
11 hit a hard surface. So we have to conform the
12 testimony to what the actual proofs are showing is
13 there's no sign of injury. And he'll tell --- well
14 the first time he'll say, 'Well then there's also
15 showing that there's hemorrhaging on the back of the
16 neck.' In --- in, excuse me, interesting since he
17 testified before that her head hit the rails. Now
18 he's saying, 'Her head hit the mattress or must have
19 hit the mattress or a padded surface but there's
20 injury to the neck.' When I asked him before, 'Was
21 there any soft tissue damage', he said, 'No.' And
22 when I asked him, 'Whether the demonstration that he
23 gave regarding throwing the model into the crib was
24 forceful', he said, 'No.' I beg to differ. And
25 when he gave his opinion it must have been a homicide

1 because that has a --- has to be a purposeful act,
2 well children suffer injuries all the time that ---
3 to the head that are not purposeful. And if you
4 have a situation where the child is susceptible to
5 small amounts of force that would cause serious
6 injury, tipping over, there's a magnitude, a
7 multitude of different examples that you could give
8 to show that it would not be --- it would not require
9 the purposeful act of another. But obviously when
10 he initially testified that he just read the police
11 report. And he said, 'Oh they said that he said
12 that he threw the child into the crib, hit the
13 rails.' But the massive amount of medical evidence
14 suggests there's no other signs of injury.
15 Skeletal, soft tissue, scratching, bruising, anything
16 to suggest that this child was mishandled in anyway.

17 Now I gave you an opening statement what I
18 thought the proofs would show. And I believe we
19 have been consistent throughout in our presentation
20 of our defense in this case. That there was a
21 chronic subdural hematoma that became symptomatic on
22 November thirtieth (30th), two thousand six (2006).
23 The origin of the --- of the uh --- hematoma, it
24 could have been from birth. It could have been from
25 Steve being careless with Madison on February

1 sixteenth (16th). It could have been from tipping
2 over. Doctor Uscinski was very medically
3 appropriate with you in saying he doesn't know. All
4 we know it existed on August thirty-first (31st)
5 because it's shown. We know it existed.

6 So I put up --- I took the uh --- excuse me.
7 This is all the doctors and all the treatment that
8 Madison received over the course of her eleven (11)
9 months of life. And Doctor Dragovic would suggest
10 there must have been some trauma, you know,
11 intentional trauma causing the initial hematoma.
12 That is, that there must have been prior abuse. And
13 I ask you to look at how many times this child was
14 seen on a regular basis for treatment. Not only her
15 well-being checkups but for her hip dysplasia, her
16 aplasia and the MRSA, including x-rays.

17 Now that --- Heather testified that she went
18 back to work shortly about six weeks after Madison
19 was born which puts right into the February range
20 when --- and this is when Steven dropped her. Now
21 and then shortly thereafter Steven went back to work
22 at lawn maintenance. And that he would work the
23 days and she would work the nights and they would
24 exchange Madison in the afternoon. And sometimes
25 even Heather having to take Madison to work in Ann

1 Arbor uh --- to uh --- because Steve was working
2 late. So and she believed it was about April. So
3 from April all the way to mid-October is when they
4 got Pitter Patter involved. This is and the
5 situation was Steve working during the days, cutting
6 lawns during the dog days of summer. Getting his
7 daughter at home or bringing her home, watching her
8 throughout the night. Heather coming home. If
9 there was abuse, if there was any abuse whatsoever of
10 any kind, wouldn't it be shown through this period of
11 time? From April to October when they are hustling
12 their fannies off to make a living, have a family,
13 and trying to provide childcare on their own.
14 Wouldn't some doctor, including her regular doctor,
15 find out that somehow Madison was being mistreated?
16 Honestly? No. The answer is no. No. No.
17 Because there was no mistreatment.

18 In mid-October she goes into Pitter Patter.
19 Mid-October. Stays six weeks. Umm --- and this is
20 after September eleventh (11th) CAT scan obviously.
21 And uh --- I thought the testimony of Lynn Peterson
22 and Sharon Klump was accurate, truthful, and very
23 illustrative of what we have told you from the
24 beginning. Madison was a healthy, happy baby who
25 hardly ever cried. She has slept well. She ate

1 well. And that was their experience with this
2 child. They never heard her scream. In fact,
3 their words were, 'She was a delight.' But on
4 November fourteenth (14th) she had to be taken out
5 because of the MRSA. But she still continued to see
6 doctors, Doctor Lipkin was being treated --- treating
7 her for the MRSA which was in her head. And if
8 she's suffering head injuries you certainly would
9 think that someone would be able to indicate, show
10 something that here's a doctor looking at her. Uh -
11 -- that if she's being mistreated someone would have
12 noticed. But she wasn't. She wasn't.

13 I just --- this (indicating) is the house.
14 This is Heather and Steven's and Madison's home as of
15 December second, December third, two thousand six
16 (2006). A nice home in South Lyon, Michigan,
17 getting ready for Christmas. This is the scene as
18 taken by the police, Sergeant Baaki, when he came
19 into the home on December second. The refrigerator
20 as prepared by Heather and Steve. And Heather said,
21 'Steve did most of it.'

22 The photo album which is into evidence, Heather
23 will --- I ask you to please take it in because of --
24 - a show of a healthy, nourished, well-loved baby.
25 Uh --- pictures primarily taken by her father. This

1 picture, October eleventh (11th), Heather testified,
2 'Taken by Steve and she is looking at her father with
3 the love that she has for him as he had for her.'

4 And this is one week, actually less than one
5 week before November thirtieth (30th), taken at
6 Thanksgiving celebration at Steve's mother's. it
7 just speaks volumes. It speaks a thousand if not a
8 million words.

9 Now I ask you to look at all the Exhibits. And
10 I ask you to be able to understand intellectually the
11 proofs and the lack of the proofs. And not allow
12 the prosecution's plea to your emotions dictate your
13 determination of the facts and application of the law
14 to the facts.

15 There are no winners in a case like this.
16 There are no winners. Everybody has lost by virtue
17 of losing a precious gift. And there's many people
18 who believe childbirth is a miracle because many
19 people can't do it.

20 Now to say that Steven acted carelessly on
21 November thirtieth (30th), I would not disagree.
22 But to say that he knew his child was vulnerable?
23 That's absolutely untrue. Who knew? Her mother is
24 a registered nurse. She didn't know. You can feel
25 and see the pain that Heather had testifying about

1 that day. How she thought she should have known
2 because of the vomiting, because of the projectile
3 vomiting, because of the headache, because of her irr
4 --- irritability, lack of being herself, the
5 sleepiness. No one knew she had a brain hemorrhage.
6 No one knew. No one knew a minor amount of force
7 could cause --- become symptomatic if it was not
8 being already by virtue of the symptoms that she was
9 showing. No one knew.

10 Now Steve lied numerous times. Numerous times.
11 There's no secret in that. There's no secret. He
12 --- he did not disclose that he threw her into the
13 crib. No question. He was scared. He did a
14 stupid thing. It's, you know, there's no question.

15 Who would ever expect that her head hitting that
16 mattress in that crib could cause such severe brain
17 injury? How could he have ever known that his
18 daughter had a potentially fatal condition that could
19 erupt spontaneously? That may have been erupted at
20 that time. Who could have known? If it was hard
21 enough to cause any kind of damage why wasn't it
22 shown? Why wasn't it? Why don't we have even a
23 bruise anywhere on the skull? Why would if the head
24 hit the mattress or the neck hit the mattress so
25 hard, why wouldn't we have damage to the soft tissue

1 in the neck?

2 Now I ask you to keep in mind that swelling is
3 exacerbated by the lack of proper oxygenation. Now
4 remember when the child, when Madison got to
5 emergency, her fontanel, the soft spot was soft.
6 It's only a day later that it became indicative of
7 swelling. And then a day later the intracranial
8 pressure monitor was put in. And after going up as
9 high as twenty (20) when ten is the limit, as high as
10 twenty (20) before she even gets back to pediatric
11 intensive care, its tripled almost to fifty (50) to
12 sixty (60).

13 Why did every doctor from U. of M. minimize the
14 old blood? Why? When it is so apparent. Why
15 does their conclusions which were based upon shaken-
16 baby syndrome which they have now abandoned to a
17 third theory, say, old blood and new blood must mean
18 nonaccidental injury? When it's clear that through
19 the medical training that the chronic subdural
20 hematoma can absorb new blood. Doctor Maher
21 testified it was unlikely because the old blood was
22 in the front. And you remember his example. And
23 the new blood was in the back. And we addressed
24 that with Doctor Uscinski. It's because the red
25 blood cells are more prone to gravitational pull.

1 The child is CT scanned laying down. That was his
2 opinion about the unlikeliness of chronic subdural
3 hematoma is because the old blood was in the front
4 and the new blood in the back.

5 The picture that Doctor Uscinski had up that was
6 in-between the slides and the OR picture, it's called
7 truth. You look long enough and it will come to
8 you. It will appear. You look long enough in this
9 case it will come to you. Madison's death was an
10 accident. There was no intent to cause his daughter
11 any serious harm. No one knew about her condition
12 even those who in the medical profession who are
13 charged with the knowledge of interpreting those
14 MRI's and those CAT scans. Who would have known
15 that an act, irresponsible as it was, of throwing her
16 into her crib onto her mattress would cause the
17 reaggravation of an existing brain hemorrhage.

18 I ask that you not decide this case based upon
19 the desire of the prosecution to win. To prove, to
20 prove, prove a charge that's simply isn't
21 appropriate, that this man murdered his daughter.
22 This is not about someone's career. This is about a
23 tragic death of an infant child that there are many
24 factors involved in determining the cause of death,
25 the intent, the carelessness. But to simply point a

1 finger at him and say, 'Because of Nicholas Kennedy
2 you can't be careless anymore. You must have done
3 this on purpose. You must have intended to injure
4 your daughter,' is simply taking the facts and it's
5 like sports and steroids, you know, to win the race,
6 to hit the ball, whatever, honorable goals. Crime
7 solution, crime prevention, honorable goals. But
8 when you exceed the bounds of fairness, when you
9 break the rules by which you're supposed to operate,
10 then haven't we lost sight of what we're trying to
11 accomplish? When you shade all the facts such that
12 it looks like the worst possible result, when you
13 fail to present the most critical evidence in the
14 case, when you change your theory, shaken-baby to
15 head hit the rails, now baby must have hit the
16 mattress too hard then it becomes about money not
17 about justice.

18 I ask for your verdict, not guilty on Count 1.
19 A finding of carelessness, recklessness on Count 2,
20 child abuse. There is no intent to harm the child
21 that he worshiped.

22 Thank you.

23 THE COURT: Ladies and Gentlemen, we've
24 been going for two hours. I'm just going to ask you
25 for a minute to go with Ms. Neff for just a second.

1 Just stretch your legs and then I'll speak to you
2 more on as to what we're doing on that. Again, just
3 please don't talk about the case. Thank you.

4 THE CLERK: All rise for the Jury.
5 (Whereupon the Jury was returned to the Jury room.)

6 * * *

7 THE COURT: Anything from Counsel as to
8 rebuttal and instructions? Any comment as to when?
9 Now or later?

10 MS. POPE-STARNES: I'd rather do
11 rebuttal right now Judge.

12 THE COURT: Mr. White any input?

13 MR. WHITE: That's fine.

14 THE COURT: Well it may be with you guys
15 but my staff and also my deputies, I want to ---

16 MS. POPE-STARNES: (Interposing)
17 That's fine. I understand.

18 THE COURT: Sure. Have you guys chime
19 in. How's it work on your end?

20 Proceed or break? I'm kind of thinking my
21 staff, especially Ms. Reznick, she's been going two
22 hours straight so that might control everything.
23 But do you guys have anything?

24 A DEPUTY: You're the boss Your Honor.
25 Whatever you say.

1 THE COURT: All right. Very well.

2 The Court will for the benefit of the Jury we've
3 been going for two hours but most importantly for the
4 staff, the Court will take a break. I've got a
5 Judge's meeting in any event. But we'll resume at
6 one-thirty (1:30) even though we went into the lunch
7 hour, okay?

8 MS. POPE-STARNES: Okay.

9 THE COURT: Thank you. And then I'll
10 proceed directly into instructions after that.

11 THE CLERK: All rise.

12 A DEPUTY: Do you want us back at one-
13 thirty (1:30)?

14 THE COURT: We'll call you.

15 A DEPUTY: Okay Sir.

16 THE COURT: All right. Thank you.

17 (Whereupon a lunch recess was had.)

18 * * *

19 THE CLERK: The Court calls the case of
20 People versus McBurney, case number 07 214651 FC.

21 THE COURT: Counsels' appearances are
22 noted. Ms. Pope-Starnes, Mr. White and your client
23 is present, I can see that there. I did ask my
24 Clerk to ask informally if anybody has any druthers
25 as to when the alternate is excused. Doesn't make

1 any difference to me other than someone's going to
2 have to sit and listen to me drone on for ten,
3 fifteen (15) minutes for instructions. But if
4 everybody agrees to do so I don't care.

5 MS. POPE-STARNES: Well I believe it
6 would be appropriate until the Jury's been instructed
7 ---

8 THE COURT: (Interposing) Okay.

9 MS. POPE-STARNES: (Continuing) so
10 that there's no chance that there's any issue until
11 the case actually goes to the Jury.

12 THE COURT: Fair enough. Okay.

13 So you can --- ready to proceed?

14 MS. POPE-STARNES: I am.

15 THE COURT: You can bring in the Jury.

16 THE CLERK: Yes Judge.

17 (Whereupon the Jury was returned to the courtroom.)

18 * * *

19 THE COURT: Good afternoon again
20 everyone. Please be seated.

21 Jeff can you check that door, same thing.

22 And again same thing to the folks that are here.
23 You're welcome to stay but we'll be uninterrupted
24 throughout. Matter of fact I would include not only
25 the rebuttal but also the instructions, the ten or

1 fifteen (15) minutes or so.

2 Ms. Pope-Starnes, you may proceed.

3 MS. POPE-STARNES: Thank you.

4 **REBUTTAL ARGUMENT**

5 MS. POPE-STARNES: You know I have to
6 say Ladies and Gentlemen of the Jury, the Defense
7 argument reminds me of uh --- I don't know if any of
8 you have ever heard of Zig Ziegler, he's a
9 motivational speaker. And one of the things he
10 does, one of the stories he tells, is about somebody
11 who tries to distract their responsibility for
12 something by blaming someone else. And he puts it
13 as, 'Don't look here. Look yonder.' And there was
14 an awful lot of that in the defense argument. Don't
15 look at Mr. McBurney. Look at the mistakes everyone
16 else allegedly has made.

17 I really don't know what Counsel's talking
18 about, about a winner in this matter. There are no
19 prizes awarded. And no matter what I do or the
20 detectives do or the doctors do, Madison McBurney
21 cannot be brought back.

22 The purpose for being here is to give the
23 Defendant a trial which he is entitled to by a Jury
24 of his peers to determine whether or not he committed
25 a crime.

1 The purpose of offering information to you about
2 Nicholas Kennedy has nothing to do with emotion. It
3 is another piece of evidence for you to consider when
4 you're trying to decide whether or not this Defendant
5 knew what the likely result of his actions were.
6 And if this was a case where there was a father and
7 this was their first baby, you wouldn't have that
8 information. But in this case you have information
9 about the experience he's had before and what he
10 knows.

11 The Defense wants to make a big deal about look
12 over here. There's no police recordings in either
13 case. First of all, Sergeant Sumner is asked to
14 testify about and asked questions about testimony
15 from ten years ago. He's told you he's had other
16 cases where there's been recordings and haven't been
17 recordings. He tried to testify from his memory as
18 best as he could. And told you that he reviewed
19 full police report before he testified.

20 No recordings in this case. Detective
21 Sederlund and Sergeant Sovik have told you they
22 didn't record his statements. They wish they had
23 but they didn't.

24 Defense talked about accidental injuries to
25 Nicholas. Accidental injuries to Nicholas.

1 People's Exhibit 16 talks about the injuries to
2 Nicholas. Talks about the diagnosis, the medical
3 diagnosis of shaken-baby syndrome. The Defendant's
4 statements in his written as well as his verbal
5 statements. That's no accident. Look at the
6 medical records where it talks about a subacute
7 hematoma or hemorrhage to Nicholas Kennedy at four
8 months of age. And he claims that he had dropped
9 him when he was one-and-a-half months of age. You
10 know from the testimony that period of time is not
11 consistent with something still being subacute at
12 four months of age.

13 This whole thing about the head hitting the
14 mattress. There was no testimony in this record
15 that this child's head hit the mattress. Four times
16 it was said in the defense closing but there was no
17 testimony from this stand that Madison's head hit the
18 mattress. The testimony was that the Defendant said
19 he threw her and her head hit the crib.

20 Doctor Dragovic told you he wasn't there. He
21 can tell you it's blunt force trauma. He doesn't
22 know what portion of this crib that her head hit or
23 her back for that matter where she sustained the
24 hemorrhage to her back. He talked to you about
25 unyielding surfaces and said that they can be

1 something soft, like the bumper pad or the mattress.
2 And he talked to you about the fact that it's
3 possible that there are no visible external injuries
4 to the scalp because it could have been protected by
5 a soft surface.

6 This whole thing about why wasn't this crib sent
7 to the crime lab to be tested. Sergeant Sovik told
8 you he looked at this crib. He did not observe
9 anything that looked like blood to him. That he had
10 no information that she was bleeding. There's no
11 testimony in this record Madison was bleeding. That
12 he looked at it and he didn't see any evidence of
13 damage to it. And Ladies and Gentlemen, whose crib
14 is this? This was Madison's crib. She was eleven
15 months old. So whose hair and skin is going to be
16 in this crib. This isn't some visiting, you know,
17 this isn't some other child's crib that Madison used
18 one time. So maybe there's going to be some
19 evidence on it. This is Madison's crib.

20 The Defense argued the police should have gone
21 to Best Buy because it was seven (7:00) to seven-
22 thirty p.m. (7:30pm). The problem with that is,
23 Sergeant Sovik testified, they were not working that
24 Saturday. He got to the police station at nine-
25 fifteen p.m. (9:15pm) Saturday night. Both officers

1 testified --- testified about getting briefed.
2 About trying to talk to some of the first responder
3 witnesses. About trying to find equipment. It's
4 well past nine o'clock (9:00).

5 Now this whole business about challenging the
6 officers testimony about the Defendant's statements.
7 Remember, number one, Heather McBurney said she
8 couldn't remember. After her husband said he threw
9 Madison in the crib, oh my gosh, of course she can't
10 remember. Her husband just admitted to her what he
11 did to this baby. Her baby is dying. She is in
12 grief. She is in shock. She hasn't slept. Does
13 it make any sense to you that what would have
14 happened is, he said, he makes that statement, 'I
15 threw her in the crib.' And the police are like,
16 'Okay. That's it. We're out of the room. We're
17 not taking anymore statements here. We don't need
18 to know anything else.' Of course that makes no
19 sense. What makes sense? Think about the
20 officers' statements. That there was further
21 conversation. That Sergeant Sovik asked, 'Well tell
22 us about what happened then.'

23 There is no testimony in this record that
24 Madison didn't get enough oxygen. The Defendant
25 made statements that he gave her rescue breaths.

1 The first responders gave her oxygen right away
2 within in three minutes of getting dispatched. She
3 got oxygen in the ambulance. She got to the
4 emergency room and an emergency room physician told
5 you she was not concerned that Madison was not
6 getting enough oxygen. The reason for the
7 intubation was simply to preserve her airway not
8 because she needed it because she wasn't breathing.

9 And remember Doctor Dragovic told us this whole
10 argument about hypoxia and ischemic injuries, that
11 this is very misleading and is often confused. And
12 until you actually do an autopsy and look at the
13 brain, you can't tell. And he did that in this
14 case. And he told you, 'This is not injuries as a
15 result of lack of oxygen. This is from blunt force
16 trauma and that the injury and swelling that results
17 from that. And the swelling leads to the oxygen in
18 the blood not being able to get to the brain.'

19 The defense says that Kevin Schuldt umm --- and
20 Lieutenant Johnston --- let me put it this way.
21 That Lieutenant Johnston must be incorrect about the
22 information he got at the house about MRSA because
23 Kevin Schuldt says, 'The father told about the MRSA.'
24 Kevin Schuldt's testimony was, 'That father told in
25 the ambulance.' Lieutenant Johnston testified he

1 was not in the ambulance. He sent Sergeant Schuldt
2 and firefighter Wilson with the two paramedics. So
3 that's consistent with Lieutenant Johnston's
4 testimony that at the scene he got these statements.
5 And in the ambulance Sergeant Schuldt first heard the
6 other statements.

7 When you think about whether or not Doctor
8 Sikavitsas was arguing with defense counsel,
9 remember, that was the only witness that counsel
10 invited to tell him if they didn't understand the
11 questions. And she did.

12 Counsel talked in closing arguments about the
13 histories given and the conflicting histories given.
14 And that maybe the People were saying that Heather
15 wasn't truthful. But Ladies and Gentlemen, ask
16 yourselves, the only people in the house after
17 Heather went to work were Madison and her father.
18 So where does Heather get the information about what
19 happened after she left. Madison's not telling her.
20 She's not verbal and we know she's unconscious and
21 unresponsive. So all the information that Heather
22 has about what happened in that house she got from
23 the Defendant.

24 Now no questions of Doctor Uscinski about the CT
25 and MRI readings by the Prosecutor. Ladies and

1 Gentlemen, Doctor Uscinski is a neurosurgeon. That
2 means he operates on people and their nervous system
3 and their brain. He is not a neuroradiologist. In
4 fact, he's not a radiologist. The questions were
5 asked by the prosecution of a neuroradiologist,
6 someone who has training and expertise in that area
7 and is qualified to answer those questions. And if
8 you'll recall, the other physicians from the
9 University of Michigan that testified several times
10 said, 'You know, I can't really answer that. I'm
11 not qualified to answer that. You need to ask a
12 radiologist or a neuroradiologist.' Even Doctor
13 Dragovic said that.

14 Why weren't MRI's and CAT scans shown until
15 rebuttal? Well number one, it wasn't relevant. It
16 wasn't necessary. What did Doctor Dragovic tell
17 you? I think he said, I think he called them
18 shadows. And he said he didn't look at them because
19 as he explained to you, those treating physicians are
20 trying to treat Madison and they were trying to make
21 her well. They need to do that through tests and
22 procedures that are the least invasive they can.
23 But once she has passed away he can do an autopsy and
24 look at things firsthand that none of the doctors can
25 look at. He doesn't need an MRI or a CAT scan to

1 see what is going on in the brain. He can look at
2 the actual brain himself.

3 And Doctor Ibrahim's testimony was presented to
4 show you the credibility or lack thereof of Doctor
5 Uscinski's testimony, who is not a neuroradiologist.
6 Doctor Uscinski claimed on the different Exhibits
7 that were put up and shown on the screen that the
8 August thirty-first (31st) showed an acute and a
9 chronic subdural. Doctor Ibrahim said, 'No. There
10 was a subacute hemorrhage or a lipoma there.'

11 Doctor Uscinski said, 'That's just there on the
12 CT in September.' Doctor Ibrahim said, 'No. You
13 cannot see it on there. The CT's don't show
14 everything that an MRI does.' And, in fact, a
15 follow-up MRI was supposed to be done in two to three
16 months. And Doctor Ibrahim told you that he could
17 still see some evidence of it on the December first
18 MRI.

19 And one of the things that Doctor Uscinski
20 failed to talk about was the subarachnoid hemorrhage
21 that was there on December first that is in a
22 different space. It is not in the subdural space
23 under the dura. It is in the subarachnoid space.
24 It was made very clear in the testimony through this
25 trial that if a subdural rebleeds it rebleeds into

1 the subdural space. Now you have a complete new
2 bleed in a new area and it's acute. It's brand new
3 on December first.

4 Doctor Dragovic told you that, 'The surface was
5 unyielding.' He didn't know what the surface was
6 but it was unyielding.

7 Now there are pictures in evidence of the
8 Defendant with Madison. You can look at those for
9 what its worth. But the --- remember, the incident
10 with Nicholas happened when the Defendant was alone
11 with Nicholas and no one was around. The incident
12 with Madison occurred when he was alone with Madison
13 and no one was around. Someone was present to take
14 those photographs of the Defendant and Madison. So
15 are they reflective of how the Defendant was when he
16 was alone with Madison? You'll have to consider
17 that.

18 The most telling thing about what Heather
19 McBurney didn't know? Because the defense keeps
20 arguing that, 'Well you know, if she had these
21 injuries that there should have been symptoms and
22 mother was a nurse.' Well first of all, Heather
23 McBurney told you, she's an orthopedic nurse. But
24 most importantly, what she didn't know, is she didn't
25 know that her husband had abused another child. If

1 she'd known that then maybe, maybe she would have
2 been alert for signs that he didn't want to watch
3 that child alone. That he wanted tag-teaming.
4 That he only wanted to watch the child when she was -
5 -- when it was time for her to be sleeping at night.

6 This is not an accident. This is not a
7 careless person. He didn't drop her. He didn't
8 lose control of her. She didn't slip out of her
9 (sic) hands. He does an intentional act. He threw
10 her.

11 What does the evidence show in this case? The
12 evidence shows this Defendant committed the crime of
13 first degree felony murder. He caused Madison
14 McBurney's death through blunt force trauma. And we
15 know he did this because he said, 'I threw her into
16 the crib.' And then that child had a new
17 subarachnoid hemorrhage. She's got bleeding in the
18 subdural space and she also has the hemorrhage in the
19 spinal area below the neck. He knowingly created a
20 very high risk of great bodily harm. Knowing that
21 such harm would be the likely result of his actions.
22 It's not being offered for a motion. It's being
23 offered to show his knowledge. He knows what can
24 happen in the rough handling of an infant because
25 it's happened before. And Nicholas Kennedy is the

1 child it happened to. And when he did this act
 2 causing Madison's death, he was committing the act of
 3 first degree child abuse. He was her parent and she
 4 was under the age of eighteen (18). And he
 5 knowingly and intentionally caused serious physical
 6 harm. He does an intentional act of throwing her.
 7 He knows what can happen. And she gets serious
 8 physical injuries, internal injuries, bleeding in the
 9 spinal --- around the spinal cord. A subarachnoid
 10 hemorrhage. Subdural hemorrhages. And she dies.
 11 What more serious injury is there than that?

12 This is an intentional act done by a man who
 13 knows what will happen if you treat and handle an
 14 infant roughly. He has committed the crime of first
 15 degree felony murder and first degree child abuse.
 16 And the People would ask you to find him guilty as
 17 charged.

18 Thank you.

19 THE COURT: All right. If I could just
 20 have everyone's attention I'm thinking maybe ten,
 21 fifteen (15) minutes for the instructions.

22 Members of the Jury, the evidence and the
 23 arguments in this case are finished and I will now
 24 instruct you on the law. That is, I will explain
 25 the law that applies to this case.

1 Remember that you have taken an oath to return a
2 true and just verdict based only on the evidence and
3 my instructions on the law. You must not let
4 sympathy or prejudice influence your decision. As
5 Jurors you must decide what the facts of this case
6 are. This is your job and nobody else's. You must
7 think about all the evidence and the testimony and
8 then decide what each piece of evidence means and how
9 important you think it is. This includes whether
10 you believe what each of the witnesses said. What
11 you decide about any fact in this case is final.

12 It is my duty to instruct you on the law. You
13 must take the law as I give it to you. If a lawyer
14 says something different about the law follow what I
15 say. At various times I have already given you some
16 instructions about the law. You must take all my
17 instructions together as the law you are to follow.
18 You should not pay attention to some instructions and
19 ignore others. To sum up, it is your job to decide
20 what the facts of the case are, to apply the law as I
21 give it to you and in that way to decide the case.

22 A person accused of a crime is presumed to be
23 innocent. This means that you must start with the
24 presumption that the Defendant is innocent. This
25 presumption continues throughout the trial and

1 entitles the Defendant to a verdict of not guilty
2 unless you are satisfied beyond a reasonable doubt
3 that he is guilty.

4 Every crime is made up of parts called elements.
5 The Prosecutor must prove each element of the crime
6 beyond a reasonable doubt. The Defendant is not
7 required to prove his innocence or to do anything.
8 If you find that the Prosecutor has not proven every
9 element beyond a reasonable doubt then you must find
10 the Defendant not guilty.

11 A reasonable doubt is a fair honest doubt
12 growing out of the evidence or lack of evidence. It
13 is not merely an imaginary or possible doubt but a
14 doubt based on reason and common sense. A
15 reasonable doubt is just that, a doubt that is
16 reasonable after careful and considered examination
17 of the facts and circumstances of this case.

18 Every defendant has the absolute right not to
19 testify. When you decide this case, you must not
20 consider the fact that he did not testify and it must
21 not affect your verdict in anyway.

22 When you discuss the case and decide on your
23 verdict you may only consider the evidence that has
24 been properly admitted in this case. Therefore it
25 is important for you to understand what is evidence

1 and what is not evidence. Evidence includes only
2 the sworn testimony of witnesses, the Exhibits
3 admitted into evidence, and anything else I told you
4 to consider as evidence.

5 Many things are not evidence and you must be
6 careful not to consider them as such. I will now
7 describe some of the things that are not evidence.
8 The fact that the Defendant is charged with a crime
9 and is on trial is not evidence. The lawyers'
10 statements and arguments are not evidence. They are
11 only meant to help you understand the evidence and
12 each side's legal theories. The lawyers' questions
13 to witnesses are also not evidence. You should
14 consider these questions only as they give meaning to
15 the witnesses' answers. You should only accept
16 things the lawyers say that are supported by the
17 evidence or by your own common sense and general
18 knowledge.

19 My comments, rulings, questions and instructions
20 are also not evidence. It is my duty to see that
21 the trial is conducted according to the law and to
22 tell you the law that applies to this case. However
23 when I make a comment or give an instruction I am not
24 trying to influence your vote or express a personal
25 opinion about the case. If you believe that I ---

1 I, strike that. If you believe that I have an
2 opinion about how you should decide this case you
3 must pay no attention to that opinion. You are the
4 only judges of the facts and you should decide this
5 case from the evidence.

6 At times during the trial I have excluded
7 evidence that was offered or stricken testimony that
8 was heard. Do not consider those things in deciding
9 the case. Make your decision only on the evidence
10 that I let in and nothing else. Your decision
11 should be based on all the evidence regardless of
12 which party produced it. You should use your own
13 common sense and general knowledge in weighing and
14 judging the evidence but you should not use any
15 personal knowledge you may have about a place, person
16 or event. To repeat once more, you must decide this
17 case based only on the evidence admitted during this
18 trial.

19 As I said before it is your job to decide what
20 the facts of this case are. You must decide which
21 witnesses you believe and how important you think
22 their testimony is. You do not have to accept or
23 reject everything a witness said. You are free to
24 believe all, none or part of any person's testimony.
25 In deciding which testimony you believe, you should

1 rely on your own common sense and everyday
2 experience. However in deciding whether you believe
3 a witness's testimony you must set aside any bias or
4 prejudice you have based on the race, gender or
5 national origin of the witness.

6 There is no fixed set of rules for judging
7 whether you believe a witness. But it may help for
8 you to think about these questions. Was the witness
9 able to see or hear clearly? How long was the
10 witness watching or listening? Was anything else
11 going on that might have distracted the witness?
12 Did the witness seem to have a good memory? How did
13 the witness look and act while testifying? Did the
14 witness seem to be making an honest effort to tell
15 the truth or did the witness seem to evade the
16 questions or argue with the lawyer? Does the
17 witness's age and maturity affect how you judge his
18 or her testimony? Does the witness seem --- does
19 the witness have any bias, prejudice or personal
20 interest in how this case is decided? Have there
21 been any promises, threats, suggestions or other
22 influences that affected how the witness testified?
23 In general, does the witness have any special reason
24 to tell the truth or any special reason to lie? All
25 in all how reasonable does the witness's testimony

1 seem when you think about all the other evidence in
2 this case?

3 Sometimes the testimony of different witnesses
4 will not agree and you must decide which testimony
5 you accept. You should think about whether the
6 disagreement involves something important or not and
7 whether you think someone is lying or simply
8 mistaken. People see and hear things differently.
9 And witnesses may testify honestly but simply be
10 wrong about what they thought they saw or remembered.
11 It is also a good idea to think about which testimony
12 agrees best with the other evidence in this case.
13 However you may conclude that a witness deliberately
14 lied about something that is important to how you
15 decide this case. If so you may choose not to
16 accept anything the witness said. On the other hand
17 if you think the witness lied about some things but
18 told the truth about others, you may simply accept
19 the part that you think is true and ignore the rest.

20 The evidence must convince you beyond a
21 reasonable doubt that the crime occurred on or about
22 November thirty (30), two thousand and six (2006) in
23 the city of South Lyon within Oakland County.

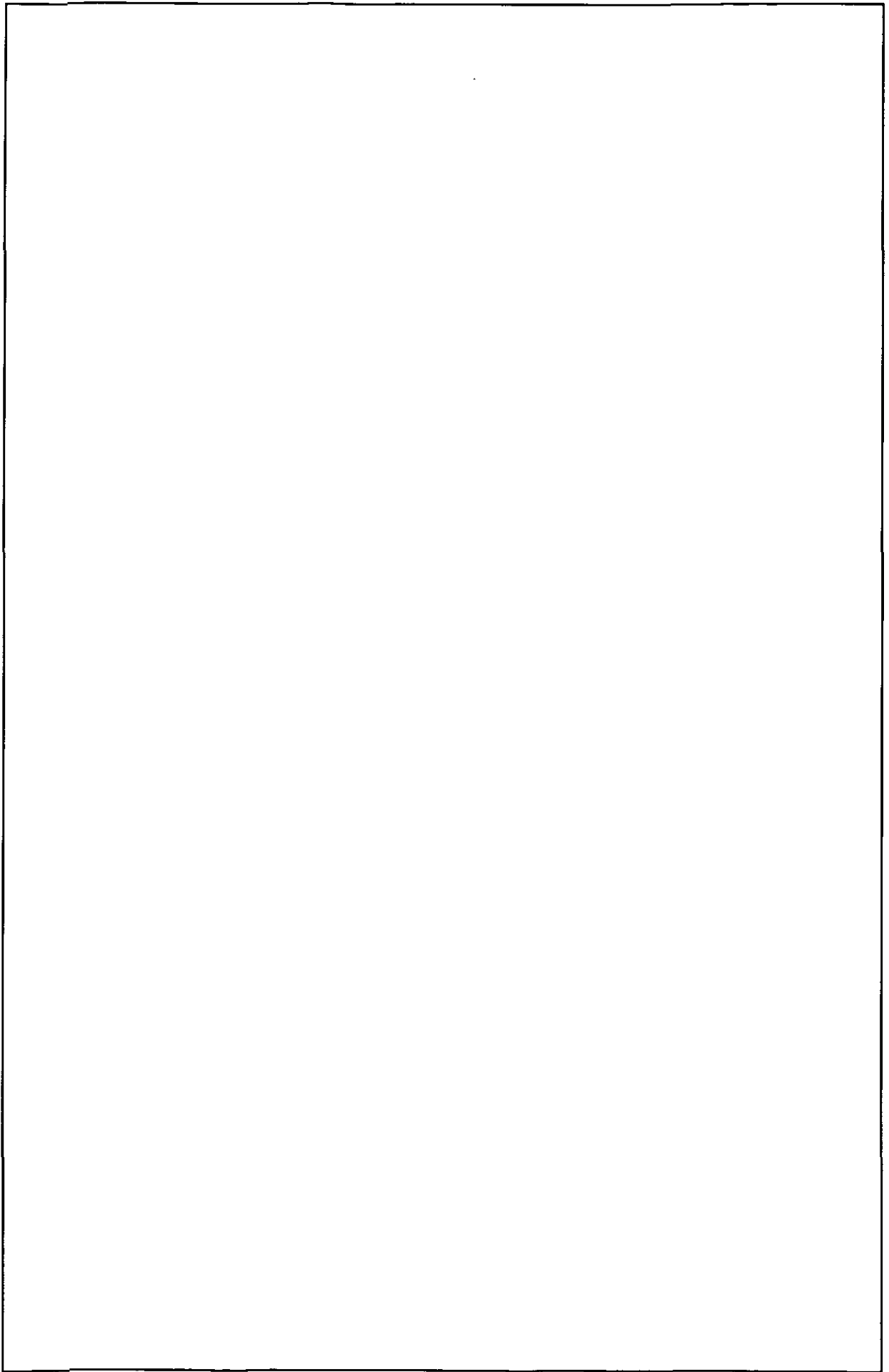
24 The prosecution has introduced evidence of a
25 statement that it claims the Defendant made. Before

1 you may consider such an out of Court statement
2 against the Defendant, you must first find that the
3 Defendant actually made the statement as given to
4 you. If you find the Defendant did make the
5 statement, you may give the statement whatever weight
6 you think it deserves. In deciding this you should
7 think about how and when the statement was made and
8 about all other evidence in the case. You may
9 consider the statement in deciding the facts of this
10 case.

11 Facts can be proved by direct evidence from a
12 witness or an Exhibit. Direct evidence is evidence
13 about what we actually see or hear. For example if
14 you look outside and see rain falling that is direct
15 evidence that it is raining. Facts can also be
16 proved by indirect or circumstantial evidence.
17 Circumstantial evidence is evidence that normally or
18 reasonably --- reasonably leads to other facts. So
19 for example if you see a person come in from outside
20 wearing a raincoat covered with small drops of water
21 that would be circumstantial evidence that it is
22 raining.

23 You may consider circumstantial evidence.
24 Circumstantial evidence by itself or a combination of
25 circumstantial evidence and direct evidence can be

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1 used to prove the elements of a crime. In other
2 words, you should consider all the evidence that you
3 believe.

4 If you believe that a witness previously made a
5 statement inconsistent with his or her testimony at
6 this trial the only purpose for which that earlier
7 statement can be considered by you is in deciding
8 whether the witness testified truthfully in Court.
9 The earlier statement is not evidence that what the
10 witness said earlier is true.

11 When the lawyers agree on a statement of facts
12 these are called stipulated facts. You may regard
13 such stipulated facts as true but you are not
14 required to do so.

15 You may consider whether the Defendant had a
16 reason to commit the alleged crime but a reason by
17 itself is not enough to find a person guilty of a
18 crime.

19 The Prosecutor does not have to prove that the
20 Defendant had a reason to commit the alleged crime.
21 She only has to show that the Defendant actually
22 committed the crime and that he meant to do so.

23 The Defendant's intent may be proved by what he
24 said, what he did, how he did it, or by any other
25 facts and circumstances in evidence.

1 You should not decide this case based on which
2 side presented more witnesses. Instead you should
3 think about each witness and each piece of evidence
4 and whether you believe them. Then you must decide
5 whether the testimony and evidence you believe proves
6 beyond a reasonable doubt that the Defendant is
7 guilty.

8 You have heard that a lawyer talked to one of
9 the witnesses. There is nothing wrong with this.
10 A lawyer may talk to a witness to find out what the
11 witness knows about the case and what the witness's
12 testimony would be.

13 The prosecution has introduced evidence of
14 claimed acts of domestic violence by the Defendant
15 for which he is not on trial. Before you may
16 consider such alleged --- alleged acts as evidence
17 against the Defendant, you must first find that the
18 fact --- that the Defendant actually committed such
19 acts. If you find that the Defendant did commit
20 those acts you may consider them in deciding if the
21 Defendant committed the offense for which he is now
22 on trial.

23 You have heard testimony from the following
24 witnesses who have given you his or her opinion as an
25 expert. Doctor Sikavitsas gave you her opinion as

1 an expert in the field of emergency room medicine.
2 Doctor Odetola gave you his opinion as an expert in
3 the field of pediatric intensive care. Doctor Maher
4 gave you his opinion as an expert in the field of
5 pediatric neurosurgery. Doctor Dev gave you her
6 opinion as an expert in the field of pediatrics and
7 pediatric child abuse. Doctor Ibrahim gave you his
8 opinion as an expert in the field of pediatric neuro-
9 -- neuroradiology. Doctor Dragovic gave you his
10 opinion as an expert in the field of forensic
11 pathology and neuropathology. Doctor Uscinski gave
12 you his opinion as an expert in the field of
13 neurosurgery. Experts are allowed to give opinions
14 in Courts about matters they are experts on.
15 However you do not have to believe an expert's
16 opinion. Instead you should decide whether you
17 believe it and how important you think it is. When
18 you decide whether you believe an expert's opinion
19 think carefully about the reasons and facts he or she
20 gave for his or her opinion and whether those facts
21 are true. You should also think about the expert's
22 qualifications and whether --- and whether his or her
23 opinion makes sense when you think about all the
24 other evidence in the case.

25 You have heard testimony from witnesses who are

1 police officers. That testimony is to be judged by
2 the same standards you use to evaluate the testimony
3 of any other witnesses.

4 The Defendant is charged in Count 1 with First
5 Degree Felony Murder. To prove this charge the
6 Prosecutor must prove each of the following elements
7 beyond a reasonable doubt. First that the Defendant
8 caused the death of Madison McBurney. That is, that
9 Madison McBurney died as a result of injuries from
10 blunt force trauma inflicted by the Defendant.
11 Second that the Defendant had one of these three
12 states of mind. He intended to kill or he intended
13 to do great bodily harm to Madison McBurney or he
14 knowingly created a very high risk of death or great
15 bodily harm knowing that death or such harm would be
16 the likely result of his actions. Third that when
17 he did that, the act that caused the death of Madison
18 McBurney, the Defendant was committing the crime of
19 child abuse first degree.

20 For the crime of child abuse first degree the
21 Prosecutor must prove each of the following elements
22 beyond a reasonable doubt. First that Steven
23 McBurney was the parent or guardian of Madison
24 McBurney. Second that the Defendant either
25 knowingly or intentionally caused serious physical

1 harm to Madison McBurney. By serious physical harm
2 I mean any physical injury to a child that seriously
3 impairs the child's health or physical wellbeing
4 including but not limited to brain damage, a skull or
5 bone fracture, subdural hemorrhage or hematoma,
6 dislocation, sprain, internal injury, poisoning, burn
7 or scald, or severe cut. Third that Madison
8 McBurney was at the time under the age of eighteen
9 (18).

10 Second degree murder. As to Count 1 you may
11 also consider the lesser charge of second degree
12 murder. To prove this charge the Prosecutor must
13 prove each of the following elements beyond a
14 reasonable doubt. First that the Defendant caused
15 the death of Madison McBurney. That is that Madison
16 McBurney died as a result of injuries from blunt
17 force trauma inflicted by the Defendant. Second
18 that the Defendant had one of these three states of
19 mind. He intended to kill or he intended to do
20 great bodily harm to Madison or McBurney or he
21 knowingly created a very high risk of death or great
22 bodily harm knowing that death or such harm would be
23 the likely result of his actions.

24 The Defendant says that he is not guilty of
25 first degree felony murder and second degree murder

1 because Madison McBurney's death was accidental. By
2 this the Defendant means that he did not mean to kill
3 or did not realize that what he did --- did would
4 probably cause a death or cause great bodily harm.
5 If the Defendant did not mean to kill or he did not
6 realize that what he did would probably cause a death
7 than he is not guilty of murder.

8 You may also consider the lesser charge of
9 involuntary manslaughter. To prove this charge the
10 Prosecutor must prove each of the following elements
11 beyond a reasonable doubt. First that the Defendant
12 caused the death of Madison McBurney. That is, that
13 Madison died as the result of blunt force trauma.
14 Second in doing the act that caused Madison's death
15 the Defendant acted in a grossly negligent manner.
16 Gross negligent means --- gross negligence means more
17 than carelessness. It means willfully disregarding
18 the results to others that might follow from an act
19 or failure to an act. In order to find that the
20 Defendant was grossly negligent you must find each of
21 the following three things beyond a reasonable doubt.
22 First that the Defendant knew of the danger to
23 another. That is, he knew there was a situation
24 that required him to take ordinary care to avoid
25 injuring another. Second that the Defendant could

1 have avoid --- could have avoided injuring another by
2 using ordinary care. Third that the Defendant
3 failed to use ordinary care to prevent injuring
4 another when to a reasonable person it must have been
5 apparent that the result was likely --- likely to be
6 serious injury. Third also that the Defendant
7 caused the death without lawful excuse or
8 justification.

9 It is not enough that the Defendant's act made
10 it possible for the death to occur. In order to
11 find that the death of Madison McBurney was caused by
12 the Defendant you must find beyond a reasonable doubt
13 that the death was the natural or necessary result of
14 the Defendant's act. The removal from life --- the
15 removal from life-support shall not be considered for
16 purposes of this instruction.

17 The Defendant is charged in Count 2 with the
18 crime of First Degree Child Abuse. To prove this
19 charge the Prosecutor must prove each of the
20 following elements beyond a reasonable doubt. First
21 that Steven McBurney was the parent or guardian of
22 Madison McBurney. Second that the Defendant either
23 knowingly or intentionally caused serious physical
24 harm to Madison McBurney. By serious physical harm
25 I mean any physical injury to a child that seriously

1 impairs the child's health or physical wellbeing
2 including but not related to brain damage, a skull or
3 bone fracture, subdural hemorrhage or hematoma,
4 dislocation, sprain, internal injury, burn or scald,
5 or severe cut. Third that Madison McBurney was at
6 the time under the age of eighteen (18).

7 The Defendant says that he is not guilty of
8 child abuse first degree because he did not intend to
9 cause serious physical harm to Madison. The
10 Defendant says that his conduct was accidental. If
11 the Defendant did not intend to cause serious
12 physical harm to Madison he is not guilty. The
13 Prosecutor must prove beyond a reasonable doubt that
14 the Defendant intended to physically harm Madison.

15 You may also consider the lesser charge of child
16 abuse second degree. To establish this charge the
17 prosecution must prove each of the following elements
18 beyond a reasonable doubt. First that Steven
19 Lindsey McBurney is the parent of Madison McBurney.
20 Second that the Defendant did some reckless act.
21 Third that as a result Madison suffered serious
22 physical harm. By serious physical harm I mean any
23 physical injury to a child that seriously impairs the
24 child's health or physical wellbeing including but
25 not limited to brain damage, a skull or bone

1 fracture, subdural hemorrhage or hematoma,
2 dislocation, sprain, internal injury, poisoning, burn
3 or scald, or severe cut. Fourth that Madison was at
4 the time under the age of eighteen (18).

5 Now when you go to the Jury room you should
6 first choose a foreperson. The foreperson should
7 see to it that your discussions are carried out in a
8 businesslike way and that everyone has had a fair
9 chance to be heard.

10 A verdict in a criminal case must be unanimous.
11 In order to return a verdict it is necessary that
12 each of you agrees on that verdict. In the Jury
13 room you will discuss the case among yourselves but
14 ultimately each of you will have to make up your own
15 mind. Any verdict must represent the individual
16 considered judgment of each Juror. It is your duty
17 as Jurors to talk to each other and make every
18 reasonable effort to reach an agreement. Express
19 your opinions and reasons for them but keep an open
20 mind as you listen to your fellow Jurors. Rethink
21 your opinions and do not hesitate to change your mind
22 if you decide that you were wrong. Try your best to
23 work out your differences. However although you
24 should try to reach an agreement, none of you should
25 give up your honest opinion about the case just

1 because other Jurors disagree with you or just for
2 the sake of reaching a verdict. In the end your
3 vote must be your own and you must vote honestly and
4 in good conscience.

5 In this case there are several different crimes
6 that you may consider. When you discuss Count 1 you
7 must consider the crime of first degree felony murder
8 first. If you all agree that the Defendant is
9 guilty of that crime you may stop your discussions as
10 to Count 1.

11 If you believe that the Defendant is not guilty
12 of first degree felony murder or if you cannot agree
13 about that crime you should consider the less serious
14 crime of second degree murder. You decide how long
15 to spend on first degree felony murder before
16 discussion --- before discussing second degree
17 murder. You can go back to first degree felony
18 murder after discussing second degree murder if you
19 want to. If you believe that the Defendant is not
20 guilty of second degree murder or if you cannot agree
21 about that crime you should consider the less serious
22 crime of involuntary manslaughter. You decide how
23 long to spend on first degree felony murder and
24 second degree murder before discussing involuntary
25 manslaughter. You can go back to first degree

1 felony murder and second degree murder after
2 discussing involuntary manslaughter if you want to.

3 You must also consider Count 2, Child Abuse
4 First Degree and decide if the Defendant is guilty or
5 not guilty of that offense. If you believe the
6 Defendant is not guilty of child abuse first degree
7 or if you cannot agree that crime, you should
8 consider the less serious crime of child abuse second
9 degree. You decide how long to spend on child abuse
10 first degree before discussing child abuse second
11 degree. You can go back to child abuse first degree
12 after discussing child abuse second degree if you
13 want to.

14 Possible penalties should not influence your
15 decision. It is the duty of the Judge to fix the
16 penalty within the limits provided by the law.

17 If you want to communicate with me while you are
18 in the Jury room, please have your foreperson write a
19 note and give it to the Bailiff. It is not proper
20 for you to talk directly with the Judge, lawyers,
21 Court officers or other people, or Clerks as you
22 recall, or other people involved in the case even if
23 it's seemingly not anything like a big deal, we want
24 more coffee. Just please write a note, okay?

25 As you discuss the case you must not let anyone

1 know, even me, how you're voting stands. Therefore
2 until you return with a unanimous verdict do not
3 reveal this to anyone outside the Jury room. If you
4 want to look at any or all of the Exhibits that have
5 been admitted just ask for them, again, by way of a
6 note.

7 When you go to the Jury room you will be given a
8 written copy of these instructions that you have just
9 heard. As you discuss this case you should think
10 about all my instructions together as the law you are
11 to follow.

12 There's also been prepared a verdict form
13 listing the possible verdicts and I have that here.
14 And that will be given to you as well, okay?

15 Again, uh --- just for a couple of minutes I'll
16 have you return to the Jury room. Please don't
17 discuss the case then until we give you the --- the
18 signal that you may begin at that time, then you
19 will, okay?

20 Thank you Ladies and Gentlemen.

21 Oh. You know what? Hold the show. I
22 forgot.

23 We have, remember we decided, we said the case
24 was going to be decided by twelve (12) and we have
25 thirteen (13). So we have an alternate that needs

1 to be called.

2 Thank you for reminding me Jeff.

3 THE CLERK: Juror Number 13, Mr. James.

4 THE COURT: Mr. James, do you have items
5 left in the Jury room, Sir?

6 THE JUROR: I beg your pardon?

7 THE COURT: Do you have some items that
8 are left in the Jury room?

9 THE JUROR: Yeah.

10 THE COURT: If you would, if you can go
11 back in with everyone. Again, like I said everyone
12 don't talk about the case yet until Mr. Rondack
13 (phonetic) gives you the go-ahead to do so.

14 If you can gather your things, and if you have
15 to get going I certainly understand. We have a
16 certificate for you. Mr. Rondack has to get your
17 badge because we're very economical here. I also
18 have a certificate showing appreciation on behalf of
19 everyone. If you have a couple of minutes I'd be
20 happy to talk with you or I'll leave it up to you,
21 okay?

22 THE JUROR: Okay.

23 THE COURT: All right.

24 Thank you very much everyone.

25 THE CLERK: All rise for the Jury.

1 (Whereupon the Jury was returned to the Jury room at
2 2:25pm.)

3 * * *

4 THE COURT: Even with my sticky note,
5 remove alternate, I still forget.

6 You may all be seated. The record will reflect
7 that the Jury has been excused.

8 Anything further from Counsel at this time?

9 MR. WHITE: Yes.

10 THE COURT: Go ahead.

11 MR. WHITE: Doing the instructions back
12 and forth, the instructions in my package and
13 Prosecutor's package, first of all the **5.10** we forgot
14 to mention Doctor Adams as an expert in the field of
15 med ---

16 MS. POPE-STARNES: (Interposing)
17 That's true.

18 THE COURT: Okay.

19 MR. WHITE: (Continuing) uh --- family
20 medicine.

21 THE COURT: Okay.

22 MR. WHITE: Secondly and most important,
23 as to **16.4** and **16.5**, first degree felony murder and
24 second degree murder, paragraph 5 was not included in
25 the instructions which was in my requested

1 instructions but not the Prosecutor's. And that
2 paragraph says, 'Fourth that the killing was not
3 justified, excused, or done under circumstances that
4 reduce it to a lesser crime.'

5 So I do believe that **5.10** has to be regiven with
6 Doctor Adams as an expert. And **16.4** and **16.5** need
7 to be regiven with parenth five in there.

8 THE COURT: Ms. Pope-Starnes?

9 MS. POPE-STARNES: I would agree.

10 THE COURT: Okay.

11 Do you have --- how do you propose the quickest
12 way to handle this would be because it's not, I don't
13 want to use the word boilerplate.

14 MS. POPE-STARNES: It is a boilerplate.

15 THE COURT: It is boilerplate?

16 MS. POPE-STARNES: It's exactly the
17 same.

18 THE COURT: Do you have uh ---

19 MS. POPE-STARNES: (Interposing) It's
20 the --- it's --- Judge, if you look at the
21 involuntary manslaughter, which is **16.10**.

22 THE COURT: Yes.

23 MS. POPE-STARNES: The last paragraph
24 four. That's the paragraph he's saying that's
25 missing.

1 THE COURT: Okay.

2 Would you both propose that I just read **16.4** and
3 then go over to **16.10** and pull out sub-para (sic)
4 four and read it there with it?

5 MS. POPE-STARNES: I think you have to
6 read the whole instruction.

7 THE COURT: I know. I know. I know.
8 I'll read **16.4** completely and then add to it that
9 language that happens to be located under **16.10** sub-
10 four. Am I saying it clearly?

11 And that would also apply to **16.5**?

12 MR. WHITE: Well it's actually a little
13 bit different Judge with ---

14 MS. POPE-STARNES: (Interposing) Oh it
15 is?

16 THE COURT: Okay.

17 MR. WHITE: (Continuing) murder
18 because it says, 'Reduce it to a lesser crime'.

19 THE COURT: Okay.

20 MR. WHITE: If I may approach?

21 THE COURT: In fact, let me do it this
22 way. Because we were going to give the Jury the
23 instruction, we need to give them --- it needs to be
24 written out. I can give my packet to you and you
25 can pencil in what needs to be added.

1 MR. WHITE: Okay.

2 THE COURT: Because we're going to give
3 them the instructions anyway, right?

4 MS. POPE-STARNES: Yes.

5 MR. WHITE: Right.

6 THE COURT: Okay. Why don't we do it
7 that way?

8 If you'd approach Counsel, I'll give it to you.

9 Jeff did the one Juror want to take off or what
10 did he ---

11 THE CLERK: (Interposing) He gave me
12 his business card. I don't believe he was leaving.

13 THE COURT: Oh. Okay. You don't
14 believe what?

15 THE CLERK: I don't believe he was
16 leaving, no.

17 MS. POPE-STARNES: I think he said he
18 wanted to talk to you.

19 THE COURT: Okay. If --- take him out
20 of the Jury room. Grab me the list of Juror
21 certificates or grab me his name out of it. It's on
22 the --- it's in the Court --- in chambers. Just
23 have him seat --- have him have a seat in chambers.
24 I don't think that all the Exhibits are out so have
25 him have a seat there, okay?

1 THE CLERK: Yes, Your Honor. So you
2 just want me to wait out here Judge?

3 THE COURT: Is that agreeable with you?

4 THE CLERK: That's fine.

5 MS. POPE-STARNES: Yes. And then the
6 formal sentence to the Jury is typed?

7 THE CLERK: Yes.

8 THE COURT: Well what I normally do is
9 just give them right back but you guys can correct
10 this and then I can give them the typed up packet.

11 The one about the experts, shall I go through
12 the entire list just to be safe and read them all
13 including Adams? Or just ---

14 MR. WHITE: (Interposing) I think it
15 would be sufficient just to say Doctor Adams
16 testified.

17 MS. POPE-STARNES: Actually I think
18 appropriate under the case law that if there's an
19 error in instructions that you have to read that
20 instruction in its entirety, unfortunately.

21 THE COURT: Any comments Mr. White,
22 other than what you've already said?

23 MR. WHITE: Nothing

24 THE COURT: All right. To keep it
25 consistent I'll just read it all over again.

1 Jeff would you please bring the Jury back in?

2 THE CLERK: Yes Your Honor.

3 MS. POPE-STARNES: Judge I know that
4 those three things I think that my secretary can
5 bring it up on the computer.

6 THE COURT: Oh if she can, okay.

7 What I'll do is I'll give the packet back.

8 MS. POPE-STARNES: I can ask her to
9 email them over.

10 THE COURT: Okay. I'll just give it
11 back.

12 MS. POPE-STARNES: Right away. I'll
13 have her do it immediately.

14 THE COURT: **5.10, 16. ---**

15 THE COURT REPORTER: (Interposing) four.

16 THE COURT: **16.10, ---**

17 THE COURT REPORTER: (Interposing) four.

18 No. **16.4** and **16.5**.

19 THE COURT: I'm sorry. I'm sorry.

20 Thank you Barb.

21 There it is, **16.4** and ---

22 THE CLERK: (Interposing) All rise for
23 the Jury.

24 (Whereupon the Jury was returned to the courtroom.)

25 THE COURT: Good afternoon again

1 everyone. Please be seated.

2 The record will reflect that the Jury is back.
3 And what --- that's one of the reason why I say,
4 'Please don't talk about the case until we give you
5 the go-ahead.' There's a couple of instructions
6 that need some clarification so just please bear with
7 me.

8 Ladies and Gentlemen, you have heard testimony
9 from the following witnesses who have given you his
10 or her opinion as an expert. Doctor Sikavitas ---
11 Sikavitsas gave you her opinion as an expert in the
12 field of emergency room medicine. Doctor Odetola
13 gave you his opinion as an expert in the field of
14 pediatric intensive care. Doctor Maher gave you his
15 opinion as an expert in the field of pediatric
16 neurosurgery. Doctor Dev gave you her opinion as an
17 expert in the field of pediatrics and pediatric child
18 abuse. Doctor Ibrahim gave you his opinion as an
19 expert in the field of pediatric neuroradiology.
20 Doctor Dragovic gave you his opinion as an expert in
21 the field of forensic pathology and neuropathology.
22 Doctor Uscinski gave you his opinion as an expert in
23 the field of neurosurgery. Doctor Adams gave you
24 his opinion as an expert in the field of family
25 medicine. Experts are allowed to give opinions in

1 Courts about matters they are experts on. However
2 you do not have to believe an expert's opinion.
3 Instead you should decide whether you believe it ---
4 whether you believe it and how important you think it
5 is. When you decide whether you believe an expert's
6 opinion think carefully about the reasons and facts
7 he or she gave for his or her opinion and whether
8 those facts are true. You should also think about
9 the expert's qualifications and whether his or her
10 opinion makes sense when you think about the other
11 evidence in the case.

12 The Defendant is charged in Count 1 with First
13 Degree Felony Murder. To prove this charge the
14 Prosecutor must prove each of the following elements
15 beyond a reasonable doubt. First that the Defendant
16 caused the death of Madison McBurney. That is, that
17 Madison McBurney died as a result of injuries from
18 blunt force trauma inflicted by the Defendant.
19 Second that the Defendant had one of these three
20 states of mind. He intended to kill or he intended
21 to do great bodily harm to Madison McBurney or he
22 knowingly created a very high risk of death or great
23 bodily harm knowing that death or such harm would
24 likely be the result of his actions. Third that
25 when he did the act that caused the death of Madison

1 McBurney, the Defendant was committing the crime of
2 child abuse first degree.

3 For the crime of child abuse first degree the
4 Prosecutor must prove each of the following elements
5 beyond a reasonable doubt. First that Steven
6 McBurney was the parent or guardian of Madison
7 McBurney. Second that the Defendant either knew or
8 intentionally caused the serious physical harm to
9 Madison McBurney. By serious physical harm I mean
10 any physical injury to a child that seriously impairs
11 the child's health or physical wellbeing including
12 but not limited to brain damage, a skull or bone
13 fracture, subdural hemorrhage or hematoma,
14 dislocation, sprain, internal injury, poisoning, burn
15 or scald, or severe cut. Third that Madison
16 McBurney was at the time under the age of eighteen
17 (18).

18 And fourth with respect to the charge of first
19 degree felony murder, that the killing was not
20 justified, excused, or done under circumstances that
21 reduce it to a lesser crime.

22 As to Count 1 you may also consider the lesser
23 charge of second degree murder. To prove this
24 charge the Prosecutor must prove each of the
25 following elements beyond a reasonable doubt. First

1 that the Defendant caused the death of Madison
2 McBurney. That is that Madison McBurney died as a
3 result of injuries from blunt force trauma inflicted
4 by the Defendant. Second that the Defendant had one
5 of these three states of mind. He intended to kill
6 or he intended to do great bodily harm to Madison or
7 McBurney or he knowingly created a very high risk of
8 death or great bodily harm knowing that death or such
9 harm would like --- would be the likely result of his
10 actions. Third that the killing was not justified,
11 excused or done under circumstances that reduce it to
12 a lesser crime.

13 Cover it?

14 MR. WHITE: May we approach?

15 THE COURT: Yes you may.

16 (Whereupon a discussion was held at the Bench out of
17 hearing of the Jury and the Court Reporter.)

18 * * *

19 THE COURT: Ladies and Gentlemen, what
20 I've done was to reread some of the instructions that
21 I missed and left out a couple of words. And you
22 may have figured out those words by me reading them.
23 That is not to suggest that the other instructions
24 don't apply. All the instructions, all the lessers,
25 all the other instructions about members of the Jury

1 the case is now completed, all those other
2 instructions still apply. And there won't be any
3 question when I give you the final packet which
4 concludes the comprehensive set, okay?

5 So if you just keep that in mind.

6 Once again, it shouldn't be much longer. I'll
7 have you return to the Jury room and then in a couple
8 of seconds, we'll give you the go-ahead, okay?

9 Thank you folks.

10 THE CLERK: All rise for the Jury.
11 (Whereupon the Jury was returned to the Jury room.)

12 * * *

13 THE COURT: Deputies, thank you very
14 much. We'll let you know.

15 I will give this packet back Ms. Pope-Starnes to
16 you if you would. And you can work with Ms. Garelik
17 with Mr. White and insert the proper ones in. If
18 you'd approach? And then when it's done just give
19 it back to Jeff.

20 MS. POPE-STARNES: Your Honor, then are
21 you going to tell the Clerk the Jury can begin
22 deliberating?

23 THE COURT: Is that agreeable?

24 MR. WHITE: Agreed.

25 THE COURT: Okay.

1 MS. POPE-STARNES: And Your Honor, I've
2 compiled all our Exhibits, all the People's Exhibits
3 are right here in this rubber band.

4 THE COURT: Very well, all right.

5 What I'll do is uh --- Counsel when you get the
6 final set, just initial the top page or something and
7 give it to Vincent Rombeck. And without any
8 objection I will sua sponte so to speak and give them
9 the instructions and then will await notes as to
10 Exhibits and so forth. Fair enough?

11 Thank you.

12 Thank you Deputies.

13 A DEPUTY: Thanks Judge.

14 THE CLERK: All rise.

15 MS. POPE-STARNES: You're welcome Your
16 Honor.

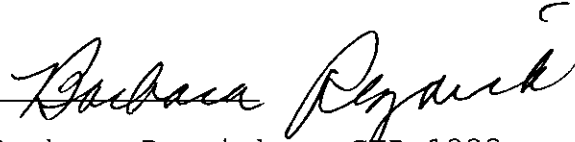
17 (Whereupon the matter was concluded.)

18 * * *

STATE OF MICHIGAN)

COUNTY OF OAKLAND)

I, Barbara Reznick, Court Reporter, do hereby
certify that the foregoing pages comprise a full, true, and
correct transcript of the proceedings had In the Matter of
McBurney before Honorable Daniel Patrick O'Brien in
Pontiac, Michigan on March 04, 2008.



Barbara Reznick, CER 1333

1200 N. Telegraph, Pontiac, MI. 48341

248) 858-5841